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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

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QUESTIONS PRESENTED

1. When this Court vacates a state judgment and mandates the state court to reconsider its judgment, does the state court violate the mandate when it re-instates its judgment on new grounds not encompassed within the prior judgment or the mandate of this Court?

2. Are the Fourth and Fourteenth Amendments violated by warrantless searches of private property other than luggage when such property has been immobilized during a highway stop and arrest?

3. What constitutional limits apply when inferences drawn from the appearance of a closed package or container are used to avoid the Warrant Requirement?

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Petitioner, Jeffrey Richard Robbins, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California in and for the First Appellate District (1/Crim. 14387) entered in this matter on March 24, 1980 as a result of this Court's June 25, 1979 mandate in Robbins v. State of California, No. 78-567.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on July 5, 1978, denying a petition for hearing, are reproduced in the appendix.

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 90 days of April 30, 1980.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

The Stop

On January 5, 1975 at 1:45 a.m., while traveling along Interstate 80 in the foggy and very cold morning hours, Officer DePue of the California Highway Patrol observed petitioner's stationwagon, between one tenth and one quarter mile distant, traveling on Nelson Road. (R.T.S. 4:16-28, 9:26-27, 5:1-7; R.T. 65:6-9)

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[1]The following designations have been used in this brief: P.H. (Reporter's Transcript of Preliminary Hearing); R.T.S. (Reporter's Transcript of Special Suppression Hearing); R.T. Reporter's Transcript on Appeal); R.T.J.S. (Reporter's Transcript of Judgment and Sentencing); C.T. (Clerk's Transcript).

Despite the difficult viewing conditions, which limited visability to one quarter of a mile, Officer DePue formed an opinion that petitioner was driving too slowly. (R.T.S. 6:2-3) It was later established that this opinion was mistaken and based upon DePue's mistaken belief that the speed limit on Nelson Road was much higher than it actually was. (R.T. 202:13-28, 229:26-239:9, 240:5-241:19)

Viewing the distant scene in this false light, DePue likewise believed he observed petitioner twice cross over the broken yellow road line, once three feet and once a full vehicle width. (R.T. 6:9-16, 7:24-8:4) DePue, however, never testified that his limited view of the distant scene allowed him to determine whether these alleged maneuvers were in violation of law.

Upon exiting the freeway Officer DePue and his partner, Officer Stoltz, stopped petitioner to question him about his driving. Since the road did not have a shoulder, petitioner's vehicle was stopped in the middle of the right hand roadway. (R.T. 75:8-19)

Petitioner stepped out of his stationwagon and produced his driver's license. (R.T.S. 8:11-22) Asked to produce a registration, petitioner returned to his car and proceeded to look for the registration. (R.T.S. 8:25-28) While the door was opened Officer DePue detected the odor of burned marijuana. (R.T.S. 9:28-10:21) Immediately upon receiving petitioner's registration, DePue arrested petitioner for driving under the influence of marijuana. (R.T.S. 20:20-25, 9:16-17)

The Automobile Search

A search of the passenger compartment then followed. Several entries were made into the vehicle which yielded evidence to support the basis for the arrest: two pairs of tweezers, one with a hand-rolled cigarette butt, and a cookie tin containing cigarette papers and approximately ⅛th oz. of marijuana. (R.T.S. 11:27-12:9, R.T.S. 17:17-18:12, P.H. 25:4-5)

While this search took place Robbins was kept spread-eagled against his still-running car, breathing in the fumes from its exhaust. (P.H. 7:11-16, R.T.S. 10:21-25, R.T. 80:17-18) At some point he was overcome by these fumes and fell into the middle of the oncoming roadway, where he vomited.

Still standing outside in what Officer DePue described as a very cold night, Robbins was swallowing rapidly and perspiring profusely. (R.T.S. 14:15-16, 9:26-27) He began saying irrational things and looked wild-eyed. (R.T.S. 15:12-17, P.H. 26-28) He was then handcuffed, and while DePue continued the search, Stoltz questioned Petitioner in order to complete a lengthy vehicle impoundment form. (R.T.S. 15:12-28) Shortly thereafter, and after Robbins learned of the search of the cookie tin, Robbins allegedly stated to Sergeant Stoltz, "What you are looking for is in the back." (R.T.S. 15:26-26:6, R.T. 120:23-25) Robbins was then removed from the cold and placed in the patrol vehicle. (R.T. 50:8-12)

The Luggage Search

Removing the keys from the petitioner's ignition, DePue unlocked and opened the tailgate of the wagon. (R.T.

50:13-15) Picking up the floor rug, DePue discovered a luggage compartment under the floor in the rear deck of the wagon. (P.H. 22:16-18) Pulling a handle set flush into the deck, DePue opened the luggage compartment and observed therein two pieces of luggage and two sealed packages. (*Id.* P.H. 23:7-24:6)

DePue proceeded to open up these items. He first opened up a brown leather tote bag and discovered a masonry jar and three white plastic bags, each of which was double taped. (R.T. 133:6-7) After they were opened these items were found to contain a total amount of marijuana in excess of one pound. (P.H. 25:9-13)

DePue next removed and opened a brown leather briefcase and rummaged through petitioner's clothing. (P.H. 13:17-18, R.T. 54:28-55:9) DePue then removed a package wrapped in opaque green plastic and sealed closed. (P.H. 13:28-14:21, R.T. 57:20-17)

Justice Rattigan of the California Court of Appeal provides a vivid description of this package:

"The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.

"The photograph thus presents to me the visual impression of a package that had been tightly wrapped for

shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile."

Upon opening this package DePue discovered a block of marijuana weighing approximately fifteen pounds. (P.H. 25:6-8) Finally, DePue removed and opened a similar package containing approximately the same amount of marijuana. (*Id.*)

The Proceedings In The Trial Court

Petitioner was charged with counts of possession of marijuana, possession of marijuana for sale, transportation of marijuana, and driving under the influence of a drug.

On January 14, 1975 during the preliminary hearing in the municipal court, petitioner's counsel orally objected to the introduction into evidence of all articles taken during the warrantless search of the trunk. (P.H. 26) The court reserved counsel's objection but permitted the items to be received in evidence. (P.H. 26-27)

At the preliminary hearing the District Attorney elicited from DePue a statement that he had heard that contraband is sometimes packaged the way the two parcels were packaged. DePue, however, said he hadn't seen this himself (in all of his eight years with the Highway Patrol) and discredited this information as "merely hearsay." (P.H. 24; R.T.S. 22:9-10)

On March 24, 1976 petitioner's motion to suppress all tangible evidence as obtained in violation of petitioner's constitutional rights came on for hearing and was denied. (R.T.S. 2-37)

Petitioner was convicted of possession of marijuana, possession for sale, and transportation of marijuana, but found *not guilty* of driving under the influence of a drug. Petitioner was sentenced to prison for a term of five years to life and has been released on bail pending Supreme Court review after serving only a portion of this sentence.

Proceedings In The Appellate Courts and This Court

On May 9, 1978 the Court of Appeal, First Appellate District, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. The court upheld the warrantless search of the luggage and sealed packages in the luggage compartment "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at p. iv, App. Petition For A Writ of Certiorari in Robbins v. State of California, No. 78-567). No other exceptions to the Warrant Clause were relied upon.

On June 25, 1979 this Court granted a petition for a writ of certiorari, ordered the judgment of the Court of Appeal to be vacated, and remanded the case to the Court of Appeal for further consideration in light of *Arkansas v. Sanders*, 442 U.S. .....; 61 L.Ed.2d 235; 99 S.Ct. 259.

On remand, the California Attorney General conceded that the warrantless search of the tote bag and cookie tin was in violation of the Fourth Amendment.

On March 4, 1980, two members of the Court of Appeal, over the dissent of Justice Rattigan, ruled that the mandate of this Court did not require the suppression of the sealed plastic packages on the ground that "the packages did not support a reasonable expectation of privacy." (Opinion at p. 6, App.) Relying upon Officer DePue's statement that he had heard that contraband is sometimes wrapped in this manner, the Court of Appeal found as follows:

> "Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not *commonly* packaged in this manner. . . . Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana. The parcels thus could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment." (Opinion at p. 6, App.) (Emphasis in the original)

On April 30, 1980, over the dissent of Chief Justice Bird and Justice Tobriner, the California Supreme Court voted to deny a petition for hearing.

REASONS FOR GRANTING WRIT

I

THE CALIFORNIA COURT OF APPEAL HAS NOT FOLLOWED THE MANDATE OF THIS COURT

Petitioner submits that the California Court of Appeal, despite its choice of labels, has essentially sought to authorize a warrantless search on the ground that contraband was in "plain view."

The marijuana, of course, was not in plain view. Officer DePue could not see through the opaque green plastic wrap. He was not even attracted to the packages when he first saw them lying side by side with other property in the luggage compartment. Nevertheless, through the power of *hindsight,* the contents of the packages now appear obvious to two members of the Court of Appeal. Since no other recognized exception to the Warrant Clause would apply, this is tantamount to a claim that the contents of the packages were subject to the "plain view" exception.

The record of this case prior to the June 25, 1979 mandate of this Court provides absolutely no basis for such a claim. Although an objection to the warrantless search was made in the trial court, no plain view exception was claimed. (P.H. 1-28; R.T.S. 1-37). Nor was the plain view exception urged by the State of California on appeal. (Respondent's Brief, dated January 18, 1978, filed in the California Court of Appeal).

The May 9, 1978 decision of the California Court of Appeal upheld the warrantless search on one ground only, "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at p. iv, App. to Petition For A Writ of Certiorari, *Robbins v. State of California,* No. 78-567).

Had the plain view exception been previously raised or decided upon, petitioner might have filed a different petition to this Court, the review by this Court might have been different, a different mandate might have issued, or no mandate at all might have issued.

But this was not the case. The review of this Court was directed to a decision of the California Court of Appeal which did not encompass a claim that the search could be upheld under the plain view exception to the Warrant Clause. Petitioner submits that this should settle that issue forever. Any other result permits a lower appellate court to undermine the authority of this Court and make the review process of this Court a waste of time for both the Court and the petitioner.

Petitioner therefore submits that the California Court of Appeal is in violation of the mandate of this Court. Petitioner furthermore submits that insofar as much of this Court's workload is accomplished through mandates directing lower courts to reconsider their decisions on the basis of specified decisions of this Court, this issue is important for review.

II

ALTHOUGH THE ISSUE IS PRESENTED DAILY TO POLICE AUTHORITIES AND THE COURTS, THIS COURT HAS NOT YET ARTICULATED A CONSTITUTIONAL STANDARD FOR SEARCHES OF PRIVATE PROPERTY IMMOBILIZED BY POLICE AUTHORITIES AS A RESULT OF A HIGHWAY STOP AND ARREST

In *Arkansas v. Sanders*, 442 U.S. 753; 61 L.Ed.2d 235 (1979), this Court held that in the absence of exigent circumstances, the police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. But, as Justice Blackmun noted in his dissent,

> "Still hanging in limbo, and probably soon to be litigated, are the briefcase, the wallet, the package, the paper bag, and every other kind of container." 442 U.S. at ..... .

Highway searches of private property other than luggage occurs daily, however, and the issue "continues to occupy much of the attention of courts at all levels of the state and federal judiciary." *Arkansas v. Sanders*, 442 U.S. at ..... . Nevertheless, courts and law enforcement officials find it difficult to discern a clear constitutional standard for such cases. Petitioner submits that the erroneous decision of the court below resulted from this confusion and uncertainty.

Although the underlying thrust of that court's decision appeared to be to the effect that contraband was in plain view, the principles actually articulated were quite different. The Court of Appeal opinion suggests that in cases involving searches of property immobilized from a highway stop and arrest, the ultimate test is whether the property is a container which supports a "'reasonable expectation of privacy." In the hands of the Court of Appeal, however, this test is a constitutional wild card, so subjective that it provides no guidance and achieves whatever result is desired. Thus, two members of the Court of Appeal were capable of finding that there was no reasonable expectation of privacy in a package which a third member said looked like a very ordinary mail parcel.

As a Fourth Amendment standard, the concept of "legitimate expectations of privacy" is at least as old as *Katz v. United States*, 389 U.S. 347 (1967). Yet no decision of this Court has ever held it to be a test to be applied by the

officer in the field in making Fourth Amendment determinations. Some support for the notion that this might be the case in highway stop cases, however, may be found in footnote 13 of the *Arkansas v. Sanders* decision where this Court states:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant."

Some support for such a rule could likewise be drawn from the Court's references to the fact that unlike an automobile, which may be searched without a warrant, "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." 442 U.S. at .....; 61 L.Ed.2d at 244; see also 442 U.S. at .....; 61 L.Ed.2d at 245.

Nevertheless, the possibility that these dicta remarks may presage a new ultimate test under the Fourth Amendment creates enormous room for confusion. Although many thousands of cases may be governed by this test, this Court has never actually ruled upon it, explained what it means, or considered its possible conflict with other Fourth Amendment principles.

In determining whether an expectation of privacy is "reasonable", to what factors must police and the courts look for guidance? The right to privacy is the "right to be

let alone" and is said to be the most comprehensive of all rights that exist. Any search of a man's private property constitutes some invasion of his privacy.

What account is to be taken for the fact that people's expectations of privacy differ, or of the many personal factors unknown to the officer which are involved in any inquiry into a privacy question? What account is to be taken of a man uses a shoe box to transport his valuables because he can't afford a briefcase; of a man uses a paper bag walking through a high crime area because he knows that an expensive piece of luggage will attract attention, or of a man who uses an uncommon package but manifests his expectations of privacy by clutching it twice as tightly and watching it more carefully than the next man?

From which perspective must the expectation of privacy appear "reasonable"? From the perspective of the person claiming the right? Or from the perspective of the officer in the field who is "engaged in the often competitive enterprise of ferreting out crime?" *Johnson v. United States*, 333 U.S. 10, 14 (1948). The California Court of Appeal, however, suggests that only the view of the highest Court counts if that Court can reasonably conclude that the trial "court could reasonably conclude that the contents of the packages could have been inferred." (Opinion at p. 5, App.)

But why should highly personal feelings of privacy, often times fused with irrationality, be weighed on a scale of open-ended reasoning? Why must the expectation of privacy appear "reasonable" to anyone so long as the

right of privacy has not been waived by placing that which could be private "in plain view"?

With this in mind, Justice Blackmun's remarks may be well taken, that

> "(T)he carving out of a special warrant requirement for one type of personal property, but not for others, will impose untoward costs on the criminal justice systems of this country in terms of added delay and uncertainty." *Arkansas v. Sanders,* 442 U.S. ..... (dissenting opinion).

The classification of containers will not solve this problem. The types of containers in which objects may be carried are potentially infinite.

As Justice Blackmun states:

> "[S]uppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, a duffel bag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so 'personal' that they must be impounded for future search only pursuant to a warrant?" 442 U.S. at .....

The decisions of California courts demonstrate these problems. In *People v. Dalton*, 24 C.3d 850 (1979), the California Supreme Court said the warrant requirement of *Chadwick* and *Sanders* fully applied to a metal tool box and a leather box with a "Longine" watch inscription, both of which were found in an automobile trunk. In *People v. Pace,* 92 C.A.3d 199 (1979), the Warrant Clause was held to apply to a lunchbox, while in *People v. Musante,* 102 C.A. 3d 156 (1980), it was held to apply to an electric blanket

box found in an automobile. And in *People v. Robbins,* herein, it was conceded by the Attorney General that there was a reasonable expectation of privacy in a cookie tin. (Opinion at p. 3, App.).

At the same time, however, the California Court of Appeal held that there was no reasonable expectation of privacy in tape-secured plastic-wrapped packages which presented to Justice Rattigan of that court "the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes," (Dissenting Opinion at p. 11, App.) since two other Justices were of the opinion that "legally possible objects are not *commonly* packaged in this manner." (Opinion at p. 6, App.). Following this approach, some California courts have held that one has a reasonable expectation of privacy *only* if the container is of a type *commonly* used as a repository for one's personal effects. Thus, in *People v. Diaz,* 101 C.A.3d 440 (1980) the California Court of Appeal held that for this reason, there was no reasonable expectation of privacy in a closed soft drink container.[2] The court furthermore added that it disagreed with the holding in *People v. Pace, supra,* that an individual had a reasonable expectation of privacy in a lunchbox. 101 C.A.3d at 448, n.5. Likewise, in *People v. Fick,* 80 Daily Journal D.A.R. 1955 (C.A.2d, July 1, 1980) the California Court of Appeal held that there was no reasonable expectation of privacy in the contents of a paper bag seized during an automobile search.

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[2]At first impression this seems reasonable. Nevertheless, almost anyone would regard it as an invasion of privacy if government agents took a closed soft drink container from them and inspected its contents.

Federal Circuit decisions are just as perplexing. In *United States v. Dien*, 609 F.2d 1038 (1979), for example, the Second Circuit held that an occupant of a rented van had a reasonable expectation of privacy in cardboard cartons found in the back of the van which contained marijuana, *Id.* at 1045 In *United States v. Gooch*, however, the Tenth Circuit held that an occupant of a small airplane could have no reasonable expectation of privacy in large plastic sacks containing marijuana since *Sanders* applies to luggage and not "mere cargo." *Id.* at 126.

In view of this array of opinions among appellate justices about what is a reasonable expectation of privacy it may be questioned whether it is consistent with Fourth Amendment policy to entrust the officer in the field with the authority to draw inferences from facts presented to him to determine whether a reasonable expectation of privacy exists in a particular case. The point of the Fourth Amendment, according to Mr. Justice Jackson, is that these types of determinations are to be drawn by a neutral magistrate:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . When the right of privacy must yield to the right of search is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. *Johnson v. United States*, 333 U.S. 10, 13-14.

Carving out a special warrant requirement for one type of private property, found in an automobile, but not for others, may, likewise, be inconsistent with the most basic Fourth Amendment principle, recognized in *Arkansas v. Sanders*, that

> "In the ordinary case . . . a search of private property must be both reasonable and performed pursuant to a properly issued search warrant." 442 U.S. at ..... .

Variations from this rule constitute an exception from the Warrant Clause. These "few 'jealously and carefully' drawn exceptions provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas v. Sanders, id.* at ...., 61 L.Ed.2d at 242. What, therefore, are the "societal costs of obtaining a warrant" which justify the need for carving out an exception from the Warrant Clause for certain types of property found in an automobile?

Arkansas v. Sanders, indeed, appears to hold that the extent to which the Warrant Clause applies, depends not at all upon whether it is seized from an automobile:

> "Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S. at ....., n.13.

But if this is the case, then the Warrant Clause would apply to practically all private property found in an automobile, absent proof that the property fell within one of

the traditional exceptions. When an arrest is made without a search warrant, for example, a warrantless search may be made only of the area within the person's immediate control. *Chimel v. California*, 395 U.S. 752 (1969). No "reasonable expectation of privacy" test has ever been applied to the property outside that area. In such cases, the Warrant Clause ordinarily applies to all private property owned by the individual irrespective of whether the property is contained within a container. Thus, if a man is arrested in his home without a search warrant, absent proof of some exception to the Warrant Clause, the police may not pull apart his mattress, his stuffed chair, his potted plants, or his TV looking for contraband on the alleged ground that these are not "common repositories for personal effects." *See Chimel v. California*, 395 U.S. 752 (1969); *United States v. Christophe*, 470 F.2d 865 (1972). Why then should a different test apply in a man's automobile or truck? What are the "identified needs of society", *Arkansas v. Sanders*, 442 U.S. at .....; 61 L.Ed.2d at 242 which would authorize this type of warrantless search simply because the objects were found in an automobile?

For the exclusionary rule to achieve its stated constitutional objective, there must be clear constitutional standards for the police to follow. As is evidenced by the Court of Appeal decision in this case, the "reasonable expectation of privacy" test provides no guidance. While the rule suggested by Justice Blackmun—permitting warrantless searches of all property found in an automobile—would obviously serve this purpose, that approach was rejected

by the Court in *Arkansas v. Sanders*. The most clear-cut alternative would therefore be to hold that there is a reasonable expectation of privacy as to all private property seized in an automobile unless the property falls within the "plain view" exception to the Warrant Clause. *See, Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam).

Whatever this Court's decision may be as to what ultimate constitutional standard applies to searches of private property taken from an automobile search, there is no question that a clear constitutional standard and further guidance from this Court is required.

III

THE DICTA IN ARKANSAS v. SANDERS PERMITTING POLICE TO MAKE WARRANTLESS SEARCHES BASED UPON INFERENCES DRAWN FROM THE TYPE OF CONTAINER INVOLVED IS SUBJECT TO MISUNDERSTANDING, AS ILLUSTRATED BY THE MISUNDERSTANDING OF THE COURT BELOW, AND SHOULD BE EXPLAINED

To appreciate the scope of the California Court of Appeal's ruling, it must be kept in mind, as Justice Rattigan states, that each of the packages simply "presents . . . the visual impression of a package that had been tightly wrapped for shipment by mail." (Dissenting Opinion at 11, App.). Two members of the Court of Appeal, however, interpret *Arkansas v. Sanders* to hold that a package of this type of almost any size and weight is outside the Warrant Clause so long as someone is capable of drawing an

inference regarding its contents. Previously, however, it was well established that the protection of the Warrant Clause applied to all "letters and sealed packages . . . closed against inspection, wherever they may be." *Ex parte Jackson,* 96 U.S. 727, 733; 24 L.Ed. 877 (1878); *United States v. Van Leeuwen,* 397 U.S. 249; 25 L.Ed.2d 282 (1970); *United States v. Chadwick,* 433 U.S. 1, 10 (1977). Petitioner submits that this breach with the prior law points to a need for guidance by this Court.

The Court of Appeal found that there was no reasonable expectation of privacy in the taped, secured packages because Officer DePue "testified that he had heard that contraband was commonly packaged this way." (Opinion at p. 4-5, App.). Relying upon language in footnote 13 of *Arkansas v. Sanders, supra,* the Court of Appeal held that a finding of no reasonable expectation of privacy is appropriate when the police can infer the contents of the package from its outer appearance and that DePue's statement indicated that he could do so.

The language in *Arkansas v. Sanders* relied upon by the California Court of Appeal states:

> "[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Arkansas v. Sanders,* 442 U.S. at ....., n. 13.

Unfortunately, the examples drawn by this Court are not extremely useful. Although no descriptions of a kit of burglar tools can be found in standard texts on criminal investigation, it seems reasonable to assume that such a kit

is either a rolled pouch with inside pockets secured by straps or a case with room for tools therein. The first type of container might resemble an innocent tool pouch or silverware roll, while the second might be indistinguishable from a tool box or fishing tackle box.

A gun case might receive rather special treatment under the Fourth Amendment. For their own protection, and for no other reason, the police might be entitled to search a gun case found in an automobile based upon probable cause alone. But why should such principles apply to a guitar case or a shoe box or any other container which may permit inferences but not certainly about the contents of the container?

To infer means to use the power of reason to deduce something from known facts. The constitutional policy of the Warrant Clause, however, consists in requiring that "the usual inferences which reasonable men draw from evidence . . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14. Thus the policy of the Warrant Clause requires that the magistrate and not the police draw the inferences from the outward appearance of the container.

This was the rule applied in *United States v. Chadwick*, 433 U.S. 1 (1977). In that case, police were clearly able to infer the contents of the footlocker from outward appearances as well as other reliable information. Talcum powder, known to be used to cover up the odor of marijuana, was leaking and a trained dog had signalled the

presence of marijuana. Yet a warrant was held to be required.

This has always been the rule under the Warrant Clause. The exterior of a container may provide probable cause about the contents of the container, but until the contents are plainly known by the senses, there is still nothing more than probable cause. No amount of probable cause, standing alone, is sufficient to justify a search without a warrant.

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

If a special rule is to be established, permitting warrantless searches based upon the outward appearance of a container, just how much probable cause will be required? How will such a standard be applied?

Petitioner submits that the only rule regarding outward appearances of property which is both consistent with the constitution and workable is the plain view rule. Dicta in *Arkansas v. Sanders, supra,* however, cast doubt upon this, creates confusion regarding the traditional rule that probable cause standing alone does not justify a warrant and invites the police to find new avenues to avoid the warrant

requirement. Petitioner requests the court to grant the petition in order to resolve these misunderstandings which otherwise will provide a continuing source of disputes in lower courts concerning the Warrant Clause.

CONCLUSIONS

Although the general principles applicable to claims of Fourth Amendment violations are deemed well-settled, there is widespread uncertainty and confusion over how to apply these principles to cases involving private property taken from a highway stop and arrest. *Arkansas v. Sanders,* 442 U.S. 753 has resolved most of the uncertainty in cases involving luggage. Nevertheless, while automobile searches occur every hour of the day, only a small percentage of the property found in automobiles constitute luggage.

Dicta in a footnote in *Arkansas v. Sanders* presages the possibility that non-luggage searches may be governed by a test of whether the property is a container "supporting a reasonable expectation of privacy." A further test may be whether the contents of the container "may be inferred" from outward appearances.

These tests, while possibly well founded under certain Fourth Amendment principles, do not resolve the uncertainty. On the contrary, as is evidenced by the facts of the case, without further guidance from this Court these tests are constitutional wild cards. Until these highly subjective tests are explained or limited, they threaten to eclipse the most basic Fourth Amendment principles: the principle that in the ordinary case inferences are to be drawn by

the magistrate and not the police, the principle that in the ordinary case searches of private property must be performed pursuant to a warrant, and the principle that in the ordinary case no amount of probable cause, standing alone, is sufficient to justify a warrantless search.

Petitioner furthermore submits that behind the mistakes of law and despite the choice of labels the California Court of Appeal has violated this Court's mandate by reinstating their judgment on grounds which tend to nullify and undermine the review process of this Court.

For these reasons a Writ of Certiorari should be granted.

Dated: July 29, 1980

Respectfully submitted,
JOSEPH G. BAXTER
MARSHALL W. KRAUSE
Attorneys for Petitioner

(Appendix follows)

APPENDIX

In the Court of Appeal of the State of California
First Appellate District, Division Four

See Dissenting Opinion

1 Crim. No. 14387
(Sup. Ct. No. 10357)

People of the State of California,
Plaintiff and Respondent,
vs.
Jeffrey Richard Robbins,
Defendant and Appellant.

[Filed March 4, 1980]

Jeffrey Richard Robbins appeals from a judgment of imprisonment which was rendered after a jury found him guilty of possession of marijuana (Health & Saf. Code § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359), and transportation of marijuana (Health & Saf. Code, § 11360).

On May 9, 1978, in an unpublished decision, this court modified the judgment to stay the sentence for possession of marijuana for sale, and affirmed the judgment as modified.

The United States Supreme Court subsequently dealt with the problem of search of a closed container found in an automobile in *Arkansas v. Sanders* (1979) 422 U.S.

.....[1] [61 L.Ed.2d 235; 99 S.Ct. 2586]. The court then granted certiorari in the present case, vacated this courts' decision and remanded the cause to us for further consideration in light of *Arkansas v. Sanders*.

Although the appeal is from a judgment after trial, the principal challenge is to the propriety of a pretrial order denying a motion to suppress evidence (Pen. Code, § 1538.5). Therefore the following narrative is based not on the trial record, but on the evidence received at the hearing on the motion to suppress evidence.

On January 5, 1975, at 1:45 a.m., California Highway Patrol Officer DePue and Sergeant Stoltz stopped appellant's station wagon on Nelson Road in Solano County. Appellant had been driving erratically. He immediately left his car, meeting DePue halfway between the vehicles. The officer asked appellant for his operator's license and ownership registration. Appellant began talking very rapidly and had difficulty in removing his license from his wallet. DePue followed appellant to the car, and smelled marijuana smoke when appellant opened the door.

Officer DePue patted appellant down for weapons and found only a vial of liquid. The officer saw a pair of tweezers on the front seat of the vehicle, of a type used to hold marijuana roaches. He retrieved the tweezers; appellant then began to vomit in the road. In the passenger compartment DePue found a pair of tweezers holding a burned hand-rolled cigarette butt, an alligator clip, a hand-rolled cigarette, and a cookie tin which contained marijuana

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[1]Advance Report Citation: 47 U.S.L.Week 4783.

seeds, two packs of cigarette papers, and a plastic baggie containing marijuana.

While Officer DePue was searching the passenger compartment, appellant said to Sergeant Stoltz, "What you are looking for is in the back." The officers then placed appellant in the patrol car and DePue opened the luggage compartment of appellant's automobile. DePue found a tote bag and two bulky packages wrapped in plastic. DePue opened all of the packages. Each of the plastic-wrapped parcels contained approximately fifteen pounds of marijuana; the tote bag contained approximately three pounds.

I

It was lawful for the officers to stop appellant's car to determine why it was moving erratically (*People v. Boddie* (1969) 274 Cal.App.2d 408). Search of the automobile was proper when the officers learned that appellant was smoking marijuana when they stopped him.

The record establishes that when Officer DePue saw the containers in the back of the car he had probable cause to believe that they contained contraband.

Appellant contends that the Supreme Court's mandate to consider this case in light of *Arkansas v. Sanders* compels the suppression of all the marijuana found in his automobile. The Attorney General concedes that the cookie tin retrieved from the passenger compartment and the tote bag found in the luggage compartment were both closed containers for which a warrant was required under *Arkansas v. Sanders,* but contends that the plastic-wrapped

parcels were not protected by the Fourth Amendment because they were readily identifiable as marijuana bricks.

In *Arkansas v. Sanders,* the United States Supreme Court held that, absent exigent circumstances, a warrant is generally required to search closed containers removed from an automobile properly stopped in the field and searched for contraband. (Accord, *People v. Dalton* (1979) 24 Cal.3d 850, cert. applied for Dec. 1979, Supreme Ct. Dock. No. 79-930.) The court declared, however, that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." (442 U.S. at p. ..... n. 13[2] [61 L.Ed.2d at p. 245; 99 S.Ct. at p. 2593].)

Appellant argues that the contents of the plastic-wrapped packages were not in plain view. Indeed there was no testimony that the plastic wrapping was sufficiently transparent to reveal its contents. But the packages did not support a reasonable expectation of privacy.[3] Officer DePue described the package as "green-wrapped plastic blocks," and testified that he had heard that contraband

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[2]47 U.S.L.Week 4783, at p. 4786.

[3]*Arkansas v. Sanders, supra,* involved a suitcase; also see *People v. Minjares* (1979) 24 Cal.3d 410, cert. den. . . . U.S. . . . [Advance Report Citation: 48 U.S.L.Week 3222] (zippered tote bag); *People v. Pace* (1979) 92 Cal.App.3d 199 (closed lunch box).

was commonly packaged this way.[4] The packages were received in evidence at the preliminary hearing. At the subsequent suppression hearing the preliminary hearing testimony was stipulated into evidence, and the exhibits were also received, "under the same numbers they were marked at the preliminary hearing." We have not examined the packages, but the trial record does include a photograph of them in place in appellant's car. The bulky tape-secured packages do not present an appearance of containing anything other than contraband. The court could reasonably conclude that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents.

Appellant contends that diverse legally possessable objects could be wrapped in green plastic, citing *Remers v. Superior Court* (1970) 2 Cal.3d 659. In *Remers,* the California Supreme Court held that a suspect's act of showing a tinfoil package to a companion did not provide probable cause for an arrest following which an incidental search revealed the package to contain seconal tablets. The prosecution argued that the officer knew that dangerous drugs

---

[4]Redirect examination of DePue:

"Q. . . . You stated in response to Mr. Ross' question, when you first saw this brown tote bag there was nothing unusual about it; nothing about these two plastic wrapped green blocks that attractd your attention?

"A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hersay. I had never seen them before.

"Q. You had heard contraband was packaged this way?

"A. Yes."

are often packaged in tinfoil, but the court held that a tinfoil package is so commonly used for legitimate purposes, such as to wrap food or tobacco, that it in itself is not a suspicious circumstance. (*Id.*, at pp. 665-666.) *Remers* is to be distinguished from the present case. Unlike a small tinfoil package, the very appearance of a bulky, fifteen pound, brick-shaped, plastic-wrapped package suggested that it contains a specific type of contraband (a brick of marijuana). Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not *commonly* packaged in this manner, as are food and tobacco commonly wrapped in tinfoil. Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana. The parcels thus could not support a reasonable expectaton of privacy and were not protected by the Fourth Amendment.

The Attorney General has conceded that suppression of the cookie tin found in the passenger compartment and the tote bag found in the luggage compartment is mandated by *Arkansas v. Sanders*. But erroneous denial of a suppression motion and admission of evidence does not require reversal if the error was harmless. (*People v. Tarantino* (1955) 45 Cal.2d 590, 595; *People v. Daniels* (1971) 16 Cal.App.3d 36, 45.) The amount of marijuana in the improperly searched containers (about three pounds) was insignificant when compared with that contained in the lawfully searched plastic-wrapped packages (about thirty pounds). It is certain beyond reasonable doubt that the error did not affect the verdict on the

transportation count. The jury would have reached the same verdict as to the transportation count upon thirty pounds of marijuana as it did upon thirty-three pounds. Therefore, the Fourth Amendment point does not justify reversal of the judgment on that count. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

II

Appellant contends that the trial court erred when it refused to consider his renewed motion to suppress made during trial. It is clear that once a defendant's motion to suppress evidence has been denied at a special Penal Code section 1538.5 hearing in the superior court, the trial judge should not entertain a renewed motion at trial unless there is an interevening charge in the applicable law or the discovery of new evidence.[5] (*People v. Superior Court* (1971) 4 Cal.3d 605, 610, reh. den. 386 U.S. 987.)

On the second day of the trial, defense counsel moved to suppress evidence, asserting that the posted speed limit at the site of the arrest is 35 miles per hour rather than 55 miles per hour. The defense argued that this discovery destroyed the probable cause necessary for the initial stop. The motion was denied. Appellant contends that this is new evidence within the meaning of Penal Code section 1538.5, subsection (h), and that the motion should have been granted.

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[5]Penal Code section 1538.5, subdivision (h):

"If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court."

The California Supreme Court in *People v. Martinez* (1975) 14 Cal.3d 533, 537, recognized a "due diligence" limitation on the availability of a belated motion to suppress under section 1538.5, subdivision (h). The court held that a motion to suppress raised at trial was properly denied when based on information defense counsel could have obtained at any time simply by interviewing his client. The present case is similar. It may be questioned whether appellant realized the actual speed limit prior to trial. However, it is clear that defense counsel could have discovered the true speed limit simply by visiting the scene of the arrest, an act which falls within the scope of due diligence. Under the *Martinez* limitation, appellant's motion to suppress at trial was properly denied. (See *People v. Burke* (1974) 38 Cal.App.3d 708, 713.)

III

Appellant contends and respondent concedes that the sentence must be stayed as to the possession for sale count. In *People v. Sanders* (1967) 250 Cal.App.2d 123, and *In re Adams* (1975) 14 Cal.3d 629, the court recognized that while possession for sale is a crime separate from transporting, where both were part of an indivisible course of conduct which has a single objective double punishment would violate Penal Code section 654.

Appellant further contends that the offense of possession must be included within the offense of possession for sale. The jury found appellant guilty of separate counts of possession and possession for sale, upon evidence which would support a determination that appellant possessed distinct quantities of marijuana for different purposes: a

small amount in the cookie tin in the front of the car for personal use, and a large amount in the sealed packages in the baggage compartment for sale. But the contents of the cookie tin should have been suppressed under *Arkansas v. Sanders*. The only physical evidence available to support the verdicts was the marijuana in brick form found in the baggage compartment. Therefore, appellant's contention with respect to the charge of simple possession must be upheld.

IV

Appellant argues that California's marijuana laws are unconstitutional. Constitutional challenges to the marijuana laws have consistently been rejected. (See *People v. Oatis* (1968) 264 Cal.App.2d 344, cert. den. 393 U.S. 1108; *People v. Aguiar* (1968) 257 Cal.App.2d 597, cert. den. 393 U.S. 970; *People v. Glaser* (1965) 238 Cal.App.2d 819, cert. den. 385 U.S. 880, reh. den. 385 U.S. 965.) In a related contention it is argued that trial counsel manifested constitutional inadequacy when he failed to challenge the validity of the laws proscribing marijuana. It is not an indication of inadequacy for counsel to withhold making an unsound argument.

The purported appeal from the order denying the motion to suppress evidence is dismissed. The judgment is reversed as to the count of simple possession. The sentence as to the count of possession for sale is stayed. Upon such modification the judgment is affirmed as to the counts of possession for sale and of transportation.

Certified for publication.

Christian, J.

I concur:

Caldecott, P. J.

I respectfully dissent. I agree that the judgment of conviction must be reversed as to the contents of the cookie tin found in the passenger compartment of appellant's station wagon, and as to the contents of the tote bag found in the luggage compartment, but I reach the same conclusion as to the contents of the "plastic wrapped" packages found with the tote bag. Because I would therefore reverse the judgment in its entirety, contrary to part I of the majority opinion, I need not reach the points discussed in parts II and III.

In declaring closed containers to be generally within the protection of the Fourth Amendment against warrantless searches, the United States Supreme Court excepted only those containers which "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (*Arkansas v. Sanders* (1979) ..... U.S. ....., ... [61 L.Ed.2d 235, 245], fn. 13 [quoted in the majority opinion].) The most demonstrative evidence of the "outward appearance" of the two packages in question is the photograph mentioned in the majority opinion. It depicts only one of the packages as Officer DePue found them among a cluttered array of articles in the luggage compartment, but his testimonial description supports the inference that the packages were identical in appearance.

The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the

outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.

The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile.

For these reasons, I perceive nothing about the packages which dispels "any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (*Arkansas v. Sanders, supra,* ..... U.S. ..... at p. ..... [61 L.Ed.2d 235 at p. 245], fn. 13.) I cannot plausibly distinguish them from the closed containers to which the California Supreme Court unanimously extended Fourth Amendment protection under virtually identical circumstances, and on the authority of *Arkansas v. Sanders*, in one of the decisions cited in the majority opinion. (*People v. Dalton* (1979) 24 Cal.3d 850, 854 [describing a "large silver colored metal box," a "silver-gray metal box," and a "brown leather box," all of which were found in the trunk of an automobile and opened by police officers]. See also *id.*, at pp. 855-857

[invalidating the officers' warrantless search of the "boxes"].)*

The only conceivable support for the majority's contrary conclusion is Officer DePue's testimony to his "merely hearsay" impression that "[n]ormally contraband is wrapped this way," which he had "never seen" himself. He also testified that he had received limited training at the California Highway Patrol Academy, "three times," on how to identify the "odor of burned marijuana." The record does not show that he had any training on how marijuana or other contraband is "normally wrapped," nor that his "hearsay" impression on that subject was received from any reliable source, nor that he developed it in the course of his experience in law enforcement.

Given this limited authenticating background, the officer's "hearsay" certification would not have supported the issuance of a valid warrant authorizing a search of packages with the outward appearance shown here. Given the same background, I am unwilling to rely on the "hearsay" as a basis for determining that he could constitutionally open and search the packages without any warrant at all. Lacking "exigent circumstances" as well (see my footnote, *ante*), I conclude that the sealed packages were protected by the Fourth Amendment and

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*This decision also controls a significant companion point in the present case. The officers who arrested appellant had handcuffed him and positioned him away from the station wagon before its luggage compartment was opened. *Dalton* therefore establishes that there were no "exigent circumstances" justifying a warrantless search of the packages found in the compartment. (*People* v. *Dalton*, *supra*, 24 Cal.3d at p. 857.)

that their contents should have been suppressed. (*Arkansas v. Sanders, supra,* ..... U.S. ..... at pp. ....-..... [61 L.Ed.2d 235 at pp. 244-246]; compare *id.*, at p. ..... [61 L.Ed.2d at p. 245], fn. 13; see also *People v. Dalton, supra,* 24 Cal.3d 850 at pp. 855-858; *People v. Minjares* (1979) 24 Cal.3d 410, 423-424.) I would accordingly reverse the judgment of conviction in its entirety.

RATTIGAN, J.

Order Due
May 2, 1980

Order Denying Hearing
After Judgment by the Court of Appeal
1st District, Division 4, Crim. No. 14387

In the Supreme Court of the State of California

IN BANK

People

v.

Robbins

[Filed April 30, 1980]

Appellant's petition for hearing DENIED.

Bird, C.J., and Tobriner, J., are of the opinion that the petition should be granted.

/s/ BIRD

Chief Justice

No. 80-148

MAR 2 1981

ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
to the Court of Appeal, State of California
First Appellate District

JOINT APPENDIX

MARSHALL W. KRAUSE,
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Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 29, 1980
CERTIORARI GRANTED JANUARY 19, 1981

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, California, in which county the within mentioned mailing occurred, and not a party to the subject cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On March 5, 1981 I served the within Joint Appendix on the respondent to said action by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Larkspur, California, addressed as follows:

Attorney General of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 1981, at Larkspur, California.

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OPINION BELOW:

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on April 30, 1980, denying a petition for hearing, are reproduced in the appendix to the petition for writ of certiorari filed herein.

IN THE MUNICIPAL COURT OF

FAIRFIELD-SUISUN-VACAVILLE JUDICIAL DISTRICT

COUNTY OF SOLANO, STATE OF CALIFORNIA

Honorable CURTIS G. SINGLETON, Presiding

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JEFFREY RICHARD ROBBINS, Defendant.	No. 10357 FILED FEB 6-1975 NEIL CRAWFORD, County Clerk By ROBERT KLEIN Deputy Clerk

REPORTER'S TRANSCRIPT OF
PRELIMINARY HEARING

TUESDAY, JANUARY 14th, 1975

-oOo-

APPEARANCES

For the People: ERIC R. ULDALL, Esq.
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Fairfield, CA 94533

For the Defendant: WILLIAM ROSS, Esq.
Attorney at Law
348 Twenty-Ninth Avenue
San Francisco, CA 94121
(415) 387-0880

I N D E X

PEOPLE'S WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
DEPUE, RONALD	3	15	24	=

PEOPLE'S EXHIBITS	DESCRIPTION	FOR IDENT.	IN EVIDENCE
No. 1	Evidence envelope	8	27
No. 1-A	Candy tin & contents	8	27
No. 2	Brown tote bag & contents	11	27
No. 2-A	Glass jar & contents	12	27
No. 2-B	White plastic bag & contents	13	27
No. 2-C	White plastic bag & contents	13	27
No. 2-D	White plastic bag & contents	13	27
No. 3	Plastic wrapped block	13	27
No. 4	Plastic wrapped block	13	27
No. 5	Chemist's report		25

-oOo-

TUESDAY, JANUARY 14th, 1975

The Preliminary Hearing of the before-entitled matter came on regularly this day in the Municipal Court of the Fairfield-Suisun-Vacaville Judicial District, County of Solano, State of California, before Honorable CURTIS G. SINGLETON, presiding.

THE PEOPLE OF THE STATE OF CALIFORNIA were represented by ERIC R. ULDALL, Deputy District Attorney for the Solano County District Attorney's Office.

The defendant JEFFREY RICHARD ROBBINS was present and in attendance and was attended and represented by his counsel, WILLIAM ROSS, Esq.

JACQUELINE I. BRADLEY, Court Reporter pro tem, was present and action.

The following proceedings were had and taken, to wit:

P R O C E E D I N G S

THE COURT: I will call the matter of People of the State of California versus Jeffrey Richard Robbins.

MR. ULDALL: Ready for the People, your Honor.

MR. ROSS: Ready of the defense.

Mr. Robbins is Present.

MR. ULDALL: I would like to call Officer DePue to the stand.

RONALD DEPUE,

called as a witness on behalf of the People, was thereupon duly and regularly sworn to tell the truth, the whole truth and nothing but the truth and testified as follows, to wit:

[3] DIRECT EXAMINATION

BY MR. ULDALL:

Q. Would you state your name for the record, please?

A. Ronald DePue, D-e-P-u-e.

Q. And your occupation?

A. State Traffic Officer.

Q. And that is with the CHP?

A. Yes.

Q. How long have you been so employed?

A. Eight Years.

Q. And on January 5th of this year, were you assigned to the Vallejo office?

A. Yes, sir.

Q. And were you on duty at 1:45 in the morning?

A. Yes, sir.

Q. And can you tell us what your location was at that time, Officer DePue?

A. Eastbound on Interstate 80, just west of Lagoon Valley.

Q. You were on patrol at that time?

A. Yes.

Q. Is Nelson Road near Interstate 80 or in that area?

A. It runs parallel near Interstate 80, on the right side.

Q. And did a vehicle come to your

attention traveling eastbound on Nelson Road?

A. Yes, sir.

Q. Could you describe that vehicle, please?

A. It was a blue 1966 Chevy station wagon, four-door station wagon.

Q. And why did this vehicle come to your attention?

A. I observed that it was driving rather erratically as it was being operated eastbound on Nelson Road going into a curve just prior to the intersection at Lagoon Valley. It [4] went over the center line twice.

Q. How many lanes of traffic are there eastbound and westbound on Nelson Road?

A. One in each direction.

Q. You observed the vehicle left of the center line?

A. Yes.

Q. How far to the left?

A. Approximately the full vehicle width, the right side tire of the vehicle was still

on the line when it returned back to the lane just prior to stopping.

Q. What action did you take after making this initial observation?

A. We exited the freeway and came up next to the vehicle as it stopped on Lagoon Valley and Nelson Road, and the vehicle proceeded again across in front of us and we stopped the vehicle eastbound on Nelson Road, east of Lagoon Valley.

Q. When you say "we", are you referring to yourself and your partner, Sergeant Stoltz?

A. Yes, Sergeant Stoltz.

Q. Eastbound on Nelson Road, that is east of Lagoon Valley?

A. Yes.

Q. What transpired after the stop?

A. The defendant immediately exited his vehicle and approached the patrol vehicle.

Q. Were you the driver or the passenger in the patrol vehicle?

A. I was the passenger.

Q. Did you have contact with the driver of the station wagon at this point?

[5] A. I did meet him halfway between the two vehicles.

Q. Is that driver present here in court?

A. Yes, sir.

Q. And could you point him out and describe what he is wearing?

A. Blue denim jacket, brown hair.

Q. Is he seated to the right of Mr. Ross, here at the counsel table?

A. Yes.

MR. ULDALL: Could the record reflect that he has identified the defendant Jeffrey Richard Robbins?

THE COURT: Yes.

BY MR. ULDALL:

Q. Now, what transpired after you made your initial contact with Mr. Robbins?

A. He began talking, immediately upon

contact, very rapidly. And he started explaining that he had -- that he was looking for Highway 5. I then requested from him a driver's license. He removed his wallet and took his driver's license out.

Q. Did Mr. Robbins have any difficulty in removing the license from his wallet?

A. He passed over it twice and then removed it from the wallet and handed it to me.

Q. Was it a valid California license?

A. Yes, it was.

Q. After you had taken the license into your possession, what transpired after that?

A. I requested then his registration card for the vehicle.

Q. What did he do in responding to your request?

[6] A. He turned and returned to his vehicle. He opened the driver's backdoor and at that time retrieved a blue plastic folder. From that he took out his registration card.

Q. Where was this blue plastic folder which contained the registration card located?

A. I didn't see the location. It was behind him, to his right.

Q. How far away from Mr. Robbins and the vehicle were you when Mr. Robbins retrieved this registration card?

A. Approximately four feet.

Q. And was anything out of order that you observed, or anything that your senses detected as you reached for the card?

A. At that time I noted a very light odor and as I got closer I smelled the odor of burnt marijuana.

Q. As you got closer was the odor still a light odor?

A. No, it became very strong.

Q. Where was this odor coming from?

A. From the vehicle. It appeared to be very strong.

Q. Can you tell us whether or not at

the Highway Patrol Academy you received any training that would help you detect the odor of marijuana? A. Yes, sir.

Q. Part of the training that you received included a course to help you detect marijuana by odor? A. Yes, sir.

Q. And when was that course given?

A. I received the first course in 1968.

Q. And have you received similar courses subsequently at the CHP Academy?

A. Yes, twice.

Q. Could you describe how those courses were conducted?

[7] A. In all three cases there was burned approximately -- approximately one ounce of marijuana in a large strainer in the classroom and it was passed around the classroom so that everybody could smell it. The first time they had it hidden in the air vent of the classroom, at which time it was blown into the classroom, to find out if anybody recognized it.

Q. Was that odor similar to the odor that you smelled on the morning of January 5th? A. Yes, sir.

Q. Now, after you smelled the odor, what you believed to be burning marijuana, what action did you take?

A. I immediately placed the suspect in search position and patted him down for weapons.

Q. Were there any weapons found?

A. No.

Q. What happened after Mr. Robbins was patted down?

A. He remained in that position. I entered the vehicle at that time and began searching for contraband.

Q. Could you describe how the search proceeded, please?

A. I began searching from the driver's side. There was located a pair of surgical type scissors. Also on the other side was a hand-rolled burnt cigarette. There was

also a hand-rolled cigarette just under the left-hand side of the front seat and --

Q. And the cigarette, had it been smoked at all?

A. No, it hadn't. Also I located a tin, a fruitcake type tin on the left rear right rear floorboard of the back seat.

Q. Okay. And that fruitcake tin, what did you locate there?

A. I opened it and found it full of vegetable seeds that I believed to be marijuana seeds.

[8] Q. Was there anything else in that tin?

A Yeah. I believe there was a baggie with a flower top type plant, a marijuana plant.

MR. ULDALL: I have here an envelope and contents, which I would like to be marked People's 1 for identification.

THE COURT: All right. Counsel shall be shown that.

MR. ULDALL: I would like to see it

again, Bill.

(Thereupon, an envelope and its contents were marked People's Exhibit No. 1 for identification.)

BY MR. ULDALL:

Q. Officer DePue, I would like to show you People's 1 for identification and ask you if you have seen that envelope before?

A. No, I haven't.

Q. Okay. And is there anything you recognize about the envelope or the cover of it? A. No.

Q. Okay. Was --

A. This was processed by Drug Abuse, not me.

Q. Could you open the envelope at this time? Also, state for the record when the envelope is open.

A. It is now open.

Q. Would you please withdraw the contents of it.

MR. ULDALL: I would like to have the tin marked 1-A.

THE COURT: All right.

(Thereupon, the cake tin was marked People's Exhibit No. 1-A for identification.)

MR. ULDALL: I will show it to Mr. Ross at this time. This would be the tin and its contents.

BY MR. ULDALL: Q. Officer DePue, I would like to show you [9] what appears to be a candy tin, People's 1-A for identification. Have you seen that exhibit before, please?

A. Yes, I have.

Q. Where?

A. This is the tin that I located in the right rear floorboard of the vehicle.

Q. Are there any identification marks on that tin?

A. Yes. I placed a piece of tape over the top and it has my initials and badge number and date.

Q. Would you open the tin at this time and state for the record when it is opened, please?

A. It is now opened.

Q. Is there anything in the tin?

A. Yes.

Q. And what is in the tin?

A. What appears to be on the tin, it was sealed by me.

Q. How could you tell it was sealed by you?

A. I sealed it all the way around it and put my badge number and initials on it, "R.M. DePue, #6032".

Q. Is there anything else in the tin?

A. Yes. The roach that I located on the floor, and also it is initialed by me. Same initials and number. No, just the initials. There are two packs of paper.

Q. Those are cigarette papers?

A. Yes, both initialed by me.

Q. Those in the tin -- they were in the tin that night?

A. Yes. There is an electrical clip in the can and a can of seeds and two

surgical-type scissors.

[10] Q. Are there any seeds in the tin?

A. Yes, quite a few.

Q. Okay --

A. Also it has a roach in it.

Q. And was the baggie in the tin that night when you found it?

A. Yes.

Q. What about the seeds, were they in the tin that night? The only thing in there now that wasn't before is the handrolled cigarette and two tweezer-type items; is that correct?

A. That's correct.

Q. After finding this tin, Officer DePue, which is marked People's 1-A for identification, did you search further in the vehicle?

A. After finding the tin, the subject became ill.

Q. So what action did you take after finding the tin?

A. The subject had evidently come to a sitting position in the center of the roadway, after vomiting several times. He was helped up and taken around back of the vehicle at the left-hand, near the right rear of his vehicle, and I went back to the vehicle and continued the search.

Q. Where was Sergeant Stoltz while this was happening?

A. Near the defendant at all times.

Q. When you resumed the search, could you tell the Court how that proceeded, please?

A. I continued to go into the search, at which time Sergeant Stoltz called me and I went back to the subject at that time. He became irrational and he was wild-eyed looking and he [11] made some statement to Sergeant Stoltz and he indicated that he was becoming a little scared. He was in handcuffs at that time.

Q. After Mr. Robbins was handcuffed,

what transpired?

A. I went back to the vehicle.

Q. What happened then?

A. He called me back again, Sergeant Stoltz, at that time. He related to me that the subject had stated that what we were looking for was in the rear -- under the rear of the vehicle.

Q. What action did you take after you possessed this knowledge?

A. We opened the tailgate and lifted the rear compartment of the vehicle up.

Q. What did you observe?

A. We observed a brown tote bag, leather-type. The bag brown, was a brief-case type bag.

Q. MR. ULDALL: I have here a brown tote bag that I would like marked People's No. 2 for identification.

THE COURT: So marked.

(Thereupon a brown tote bag and its contents were marked People's Exhibit No. 2 for identification.)

BY MR. ULDALL:

Q. Officer DePue, I would like to hand you the brown leather bag, People's 2 for identification. I would like to ask you if you can identify this -- have you seen this before, please?

A. Yes, I have.

Q. And where have you seen that?

A. I found it in the luggage compartment of the vehicle.

[12] Q. Does it have your initials or any identification marks?

A. It has my initials and badge number.

Q. Would you open the bag at this time, please?

A. The bag is open.

Q. And this bag was opened by you on the morning of January 5th at the scene; is that correct? A. Yes, sir.

Q. Would you look in the bag at this time? A. Yes, sir.

Q. And is there something in the bag?

A. Yes, sir.

Q. Could you tell the Court what those items are in the bag, please.

A. One candy-type jar containing a flower top marijuana plant.

Q. How could you indentify that?

A. This was identified by me by my badge number and initials.

Q. Okay.

MR. ULDALL: Have them marked People's 2-A for identification.

THE COURT: Yes.

(Thereupon, the contents of People's No. 2 were marked People's No. 2-A for identification.)

BY MR. ULDALL:

Q. Was there anything else in that bag, Officer DePue?

A. Three white plastic bags, approximately weighing one pound each.

MR. ULDALL: Why don't we have those marked at this time, 2-B, C and D.

[13] THE COURT: All right.

(Thereupon, three plastic bags and their contents were marked People's Exhibits No. 2-B, 2-C and 2-D for identification.)

BY MR. ULDALL:

Q. I would like to hand you back the three white plastic bags, Officer, marked People's 2-B, C and D for identification. Those three bags were contained in People's 2 on the morning of January 5th?

A. Yes, they were.

Q. Whereabouts was People's 2-A, the jar with the flower --

A. Also in the bag.

Q. The bag and contents were in your custody? A. Yes, sir.

Q. Were they later turned over to some other individual?

A. They were later turned over to the Drug Abuse.

Q. Fine. And did you keep on searching after you found this brown tote bag,

Officer DePue?

A. Yes, I did. I removed -- I removed a briefcase-type bag and it contained only clothing.

Q. Was there anything else in the luggage area?

A. I removed two green wrapped plastic blocks.

MR. ULDALL: Okay. Would you take a look at these, Bill? I would like to have these marked People's 3 and 4 for identification.

THE COURT: Yes.

(Thereupon, two green plastic wrapped blocks were marked People's No. 3 and 4 for identification.)

BY MR. ULDALL:

Q. Officer, I would like to hand you the blocks of some [14] type of material wrapped in green plastic, marked People's No. 3 and 4 for identification, and ask you: Have you seen those before, please?

A. Yes, I have.

Q. How do you know?

A. I have placed my initials, my badge number on it.

Q. And whereabouts was that found?

A. This particular item was on the left side of the luggage compartment.

Q. Okay. Then that was taken into your custody; is that correct?

A. Yes.

Q. And later given to somebody else?

A. Yes.

Q. Again, that is Inspector Grundy?

A. Yes, sir.

Q. And People's No. 4 for identification, take a look at that please?

A. This is also marked by me, "R.M.D. #6032".

Q. Where have you seen that item before?

A. On the right side of the luggage compartment.

Q. That was also taken into your

custody. A. Yes, sir.

Q. And it later was turned over to Inspector Grundy? A. Yes, sir.

Q. Now, Officer DePue, this area where you observed this Chevrolet station wagon being operated and where it was stopped, that was in Solano County, California?

A. Yes, sir, it was.

MR. ULDALL: That is all I have, your Honor.

THE COURT: Cross-examination?

[15] MR. ROSS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. ROSS:

Q. Officer DePue, where did you first observe the defendant's vehicle?

A. The vehicle was eastbound on Nelson Road, approximately a quarter of a mile from Lagoon Valley.

Q. I believe you stated that it was the erratic driving that first brought the vehicle to your attention?

A. Yes, Sir.

Q. Would you please describe the erratic driving?

A. It was operated on the wrong side of the road about 30 miles an hour in a 55 mile an hour zone.

Q. Was there any other indication, other than those that you mentioned?

A. No.

Q. Would you please describe the driving conditions on that evening?

A. It was light fog in the area, very cool. The road was dry.

Q. Was the roadway lighted there?

A. No, sir.

Q. And it had been foggy all that evening; do you recall?

A. I would say from about 9:00 p.m.

Q. So the fog had come earlier in the previous evening, actually?

A. I don't understand?

Q. In other words, the foggy conditions

started, I guess, the 4th of January?

A. That's correct.

[16] Q. What would you estimate the visibility was on the roadway?

A. I'd estimate the visibility was approximately a quarter of a mile.

Q. Were the defendant's headlights on?

A. Yes, they were.

Q. Now, was it because of his erratic driving that you pulled the defendant over?

A. Yes, sir.

Q. How did you pull him over?

A. His vehicle was illuminated by our red and blue spot lights.

Q. Was the siren activated?

A. No, sir.

Q. Just the lights?

A Yes, sir.

Q. Now, about how long after you activated the light, in time, did the defendant pull over?

A. Three, four seconds.

Q. Substantially immediately, then?

A. Yes.

Q. Would you describe how he pulled off the road, please?

A. That particular area has no shoulder. He just pulled over to the right side of the traffic lane and stopped.

Q. There is no shoulder. Would you describe the side of the road, then?

A. In that particular area it is, I believe, marsh type grass growing on the right side of the roadway there.

Q. Then it would not be unexpected to pull off the roadway?

A. No. You get your vehicle stopped.

Q. I see. Now, approximately how soon after the stopping -- [17] or, excuse me, Officer DePue, where was your vehicle in relation to the defendant's?

A. Directly behind the defendant's vehicle.

Q. Were your lights still on?

A. All lights were activated then.

Q. And did the defendant get out of his vehicle then?

A. Immediately, yes.

Q. Did you notice whether his engine was still running?

A. Yes, it was.

Q. Were his lights on?

A. Yes, sir.

Q. Now, then, did you notice anything unusual about his demeanor at that time?

A. He was swallowing and perspiring and he had bloodshot, watery eyes also, at that time.

Q. Now, was it at this point that you asked for his driver's license?

A. Yes, sir.

Q. Where approximately was the defendant standing at that time?

A. He was standing approximately four feet, maybe five feet in front of the patrol vehicle, about halfway between the two

vehicles.

Q. How far was your vehicle behind the defendant's?

A. I'd estimate at least eight to ten feet.

Q. Now, at what point did you ask for the vehicle registration?

A. Right after I received the driver's license.

Q. Did you review the driver's license first? Did you examine it?

[18] A. I determined it was valid.

Q. I see. You determined it was valid? A. Yes.

Q. If I understand you, at that point you asked for his vehicle registration?

A. Yes, sir.

Q. Did he reply or respond?

A. He just went to get it at that time. I don't recall any response verbally.

Q. I see. When he went did you follow?

A. Yes.

Q. How closely were you following?

A. Two to three feet to his rear.

Q. Which side did he enter his vehicle?

A. From the driver's door.

Q. Did he locate his registration at that time? A. Yes, sir.

Q. About how long did it take him, would you say?

A. No time. He reached right in and brought it out.

Q. And at this point you smelled marijuana?

A. Initially; yes, sir.

Q. Did you place the defendant under arrest at that time?

A. I immediately took the defendant and pulled him around, told him to put his hands on the top of the car, and searched him at that time.

Q. I see. What did you do next, Officer?

A. He stood there while I was looking

in the vehicle. The next thing I observed was that I felt the vehicle move or shaking and I then observed him turn and fall to his knees outside and [19] he began to vomit.

Q. Was he placed up against the car when he fell and vomited?

A. He was at the left rear door.

Q. Was the engine still running at that time? A. Yes, it was.

Q. Now, would you describe at what point you entered the vehicle, what point in time?

A. After the pat search of the defendant.

Q. How long was that?

A. Within seconds, two seconds.

Q. What did you first observe upon entering the vehicle?

A. My first observation would be the surgical tweezers located on the seat.

Q. Which side of the vehicle did you

enter from?

A. The driver's position.

Q. Where did you observe the tweezers?

A. On the front seat, just to the right side of the center.

Q. Were they on the seat then?

A. Yes.

Q. I take it at that point you pursued your search then?

A. I noted the extremely strong odor of marijuana and I entered the vehicle.

Q. Did you notice anything unusual about those tweezers when you first saw them? A. No.

Q. Now, what -- where did you next search?

A. I looked over my left shoulder onto the dashboard of the vehicle and I observed a second set of tweezers.

Q. Were those the same type of tweezers that you found on [20] the seat?

A. Yes, sir.

Q. Did you notice anything unusual about the tweezers on the dash?

A. Yes. They had a burnt hand-rolled cigarette still attached.

Q. Did you have a flashlight with you at that time? A. Yes, sir.

Q. You continued the search with the aid of a flashlight, I take it?

A. Plus I had the spot -- the white spotlight of the patrol vehicle directed into the vehicle.

Q. Then you had plenty of light?

A. Yes, sir.

Q. Where did you next -- what else did you find then?

A. I then located the tin, at the right rear on the floor.

Q. Was this from the front seat?

A. I looked over in the back.

Q. Did you open the tin at this time?

A. Yes, I did.

Q. With regard to the tin, I was a

little confused in your prior testimony. What all did you find in the tin at the time when you opened it?

A. I opened the tin, at that time I located a large quantity of seeds, plastic baggie and cigarette papers; that was it.

Q. Now, at what point did the defendant become irrational, with regard to your search procedure?

A. It was related to me, as I was in the vehicle. I went outside, that is when it took place.

Q. Uh-huh?

[21] A. We both, my partner and myself, took him to the back of the vehicle; at which time I went back to the vehicle after that and he was continuing perspiring heavily. He began to say things that were irrational, like, "Is there any way out of this?" Anything else, I have no knowledge.

Q. Then you have no knowledge, then?

A. Of any irrational acts.

Q. After finding the tin is that when you went to the luggage compartment?

A. No, sir.

Q. What occurred in between?

A. I was called back out of the vehicle to handcuff the subject.

Q. Was he placed under arrest at that time? A. How do you mean?

Q. Had he been placed under arrest?

A. Well, had he been told that he was under arrest?

Q. Well, that, yes. Had he been told?

A. No.

Q. And you had it in your own mind that you had placed him under arrest?

A. Definitely.

Q. After going out of the vehicle, you handcuffed the defendant, did you again enter the vehicle? A. Yes.

Q. Which portion of the vehicle did you enter into?

A. Into the driver's position once

again.

Q. Was there anything additional?

A. As I entered the vehicle on the second time, I noted a [22] cigarette -- hand-rolled cigarette lying on the floor just to the left side of the seat where the adjustment is made.

A. How many times did you enter the vehicle? How many separate times did you enter the vehicle? A. Three.

Q. Does this include the luggage compartment? A. No.

Q. Three times into the front portion?

A. Yes.

Q. After finding the cigarette, is this when you went to the rear compartment?

A. No. I was once again called back to the vehicle by Sergeant Stoltz. He then told me then that the subject had stated that what we were looking for was under the rear.

Q. At that point is when you went into

the rear? A. Yes.

Q. Now, would you describe the luggage compartment, please?

A. It is under the floor in the rear deck of the station wagon. Then there is a handle set flush into the deck itself. I pulled it up and it opened to the front of the vehicle, from the rear to the front. The compartment itself was very dirty and was full of the size of the articles in it.

Q. Was the compartment open or closed, initially?

A. It was closed flush with the floorboard.

Q. Was anything else in the back compartment or on the floor, I guess it is called?

A. Yes, sir, there was.

Q. What was lying on top of the deck?

A. There was a rug, a rug remnant, lying loose on the deck, [23] and miscel-

laneous papers.

Q. Any of these miscellaneous articles on top of the baggage compartment?

A. Yes.

Q. You opened it with that on it?

A. I opened it freely with those on it. They slid off.

Q. Immediately after lifting up that luggage compartment door, what did you see at that point?

A. The first thing I saw was the brown tote bag, briefcase type bag.

Q. Anything else about the brown tote bag? A. No.

Q. Could you see anything else before you removed the articles in the compartment?

A. Yes. you could see the two green blocks on the sides of the compartment.

Q. Could you see anything else without moving the articles?

A. You could actually see the bottom of the vehicle between the two green bags.

Q. Could you observe anything else? For instance, tire iron or anything of that type? A. No.

Q. Excuse me. Could you see the briefcase that contained the clothing?

A. Yes. That was one of the first objects seen.

Q. Where was that in relation to the green bags and the tote bag?

A. In front of the bag, alongside of the tote bag.

Q. Did you say that it was not stacked on top of each other, [24] but lying side by side; is that correct?

A. Which?

Q. All the articles?

A. Yes. They were all spread out within the area.

Q. Then I take it at this point you started taking the articles out of the luggage compartment? A. Yes.

Q. Did you open all the articles at

that time? A. Yes, I did.

MR. ROSS: I have no further questions at this time.

REDIRECT EXAMINATION

BY MR. ULDALL:

Q. Was Mr. Robbins alone in the vehicle when it was stopped?

A. Yes, he was.

Q. And just one further question: You stated in response to Mr. Ross' question, when you first saw this brown tote bag there was nothing unusual about it; nothing about these two plastic wrapped green blocks that attracted your attention?

A. I had previous knowledge of transportation of such blocks. Normally contraband is wrapped this way, merely hearsay. I had never seen them before.

Q. You had heard contraband was packaged that way? A. Yes.

MR. ROSS: I have nothing further.

MR. ULDALL: At this time I believe

Mr. Ross has a couple of stipulations.

The first one would be that Inspector Grundy of the Drug Abuse Bureau, if called to testify -- or, that Mr. Menke [25] of Valley Toxicology serve were called to the stand, he would testify that the hand-rolled cigarette contained in People's 1-A for identification would be 490 milligrams of marijuana. He would also testify that approximately 12.7 grams of marijuana seeds and stems in that People's 1-A is 3.8 grams of marijuana. He would further testify that two bricks marked People's 3 and 4 for identification, each contain fifteen and three-quarter pounds of marijuana, gross weight. He would further testify that three white plastic bags contained in People's No. 2, that would be the tote bag, contain 474.2 grams of marijuana, 445.3 grams and 475.3 grams of marijuana, respectively. The fruit glass jar, People's 2-A marked for

identification would have 54.7 grams of marijuana. That covers the stipulation as to the chemist's report.

As for Inspector Grundy, if he were called to testify he would testify that in his expertise as a Drug Abuse agent that this amount of marijuana would be possessed by an individual for the purpose of sale.

I would like to have the chemist's report marked as People's No. 5 in evidence.

I previously supplied Mr. Ross with a copy, and I would offer at this time People's 1, 1-A, 2, 2-A, 2-B, 2-C and 2-D marked for identification, into evidence.

I would further move to dismiss the charge of A 364, which is Count IV as to the Complaint, that these tweezers never have been analyzed to see whether they contain any marijuana residue.

MR. ROSS: Yes, your Honor. First of all, Mr. Uldall [26] correctly stated our stipulation for the purpose of the pre-

liminary hearing.

Secondly, we would enter an objection at this time to the introduction of all evidence and all tangible evidence; that would be also the evidence in Count IV, which is dismissed.

THE COURT: I haven't dismissed it yet. The motion has been made.

MR. ROSS: I would object to all the articles taken from the rear compartment of the station wagon being introduced into evidence.

THE COURT: All right. Do you wish to be heard?

MR. ULDALL: I would like to submit that I think the law is rather clear on this point.

MR. ROSS: I would like to submit to the Court that the law in this area -- I am having a little trouble. The articles were taken from the compartment with regard to probable cause for search. The compart-

ment, your Honor, if I might ask -- your stipulation at this time. I notice that we didn't ask in the testimony, it was sort of obvious, a stipulation that this wasn't a warranted search. It was a search without a warrant.

MR. ULDALL: One further thing. To clear up any further problems in Superior Court, I move to reopen and call Sergeant Stoltz for a couple of questions.

THE COURT: Well, I don't really care what he is going to testify. If there is anything in the case as far as the question of search is concerned -- you may step down.

Let me state the Court's position first. In the first place, counsel's objection will be reserved. I think that there [27] was reasonable cause to enter the car and search, first of all, because of the smell. Also, the defendant's voluntary statement that what they were looking

for could be found in the compartment is reasonable cause to search for contraband.

All items will be received into evidence.

MR. ROSS: Very well, your Honor.

THE COURT: The matter is otherwise submitted?

MR. ULDALL: Yes.

THE COURT: I find that there is reasonable cause to believe that the offenses charged were committed by the defendant.

The motion that the fourth count be dismissed is granted.

The other counts, I feel there is reasonable cause for belief that the offenses have been committed by this defendant and he is held to answer to the charges in Superior Court.

The matter will be continued until the 29th of January at 9:00 o'clock.

MR. ROSS: Your Honor, I might have a problem. I have a trial beginning in Redwood City, it is the 27th. I estimate it will be a four or five-day trial.

THE COURT: Well, if the defendant has no objection to waiving time, we could set it over for the first week in February.

MR. ROSS: Your Honor, in February I have a civil trial in Lake County. I estimate that will be a week and a half to two weeks.

THE COURT: This is just for first appearance.

You can go to Superior Court and --

[28] MR. ULDALL: Sometime maybe before the trial in Redwood City?

THE COURT: How about the 27th?

MR. ULDALL: How about the previous Friday, the 24th?

THE COURT: All right. That only gives you approximately ten days to get the information.

The 24th of January at 9:00 o'clock, Department 3 in Superior Court.

The exhibits are ordered returned to the Drug Abuse or someone else. I don't want it here in court.

MR. ULDALL: Is that in Department 3?

THE COURT: Department 3.

MR. ULDALL: Could we get a stipulation that all the exhibits be returned to Officer DePue of the CHP and then to the evidence locker?

MR. ROSS: So stipulated.

THE COURT: So ordered. We will recess briefly.

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IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

HONORABLE ELLIS R. RANDALL, Presiding

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. JEFFREY RICHARD ROBBINS, Defendant.	No. 10357 FILED APR 17 1975 NEIL CRAWFORD, County Clerk By DIANE GARLAND Deputy Clerk

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REPORTER'S TRANSCRIPT OF 1538.5 MOTION

MONDAY, MARCH 24, 1975

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A P P E A R A N C E S

For the People: ERIC R. ULDALL, ESQ.
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Fairfield, CA 94533

For the Defendant: WILLIAM ROSS, ESQ.
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San Francisco, CA 94121

---oOo---

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT
RONALD DePUE			
By Mr. Ross		3	
By Mr. Uldall	21		
RICHARD STOLTZ			
By Mr. Ross	22		25
By Mr. Uldall		25	

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

---oOo---

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs- JEFFREY RICHARD ROBBINS, Defendant.	NO. 10357

---oOo---

MONDAY, MARCH 24, 1975

---oOo---

The above- entitled matter came on this date before Honorable ELLIS R. RANDALL, Judge Presiding in the Superior Court of the State of California, in and for the County of Solano.

The People were represented by ERIC R. ULDALL, ESQ., Deputy District Attorney of the County of Solano, State of California.

The Defendant JEFFREY RICHARD ROBBINS was personally present and in attendance upon the Court, and he was attended and represented by his counsel, WILLIAM ROSS, ESQ.

JAMES O. CLAYTON, Official Shorthand Reporter, was present and acting.

The following proceedings were had and taken, to wit:

P R O C E E D I N G S

THE COURT: The People versus Jeffrey Robbins. All right.

[3] MR. ROSS: Good afternoon, Your Honor.

THE COURT: Glad to have you with us.

MR. ULDALL: This matter comes on this afternoon for a hearing under Penal Code Section 1538.5. In order to expedite matters, we have stipulated the People's case may be presented upon the testimony taken at the preliminary hearing. Officer

DePue, the arresting officer, is present. He will then be called to the stand for further cross-examination by Mr. Ross.

THE COURT: All right.

MR. ULDALL: Officer DePue.

MR. ROSS: That is correct.

THE COURT: All right.

MR. ROSS: The purpose of our proceeding today would be merely to supplement the testimony already entered.

THE COURT: All right.

RONALD DePUE,

having first been duly and regularly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows, to wit;

CROSS-EXAMINATION

MR. ROSS: May I proceed?

THE COURT: By all means.

MR. ROSS: Thank you.

BY MR. ROSS:

Q Good afternoon.

THE COURT: Under cross-examination?

MR. ROSS: Yes, that is correct.

MR. ULDALL: Correct.

[4] MR. ROSS: Before we begin here, is the Court looking at this in the state of supplemental testimony or cross-examination? It may make a difference. I would ask the Court to consider it supplemental testimony, so we will not be limited by the scope of the preliminary hearing.

MR. ULDALL: Fine, agreed.

THE COURT: Supplemental testimony.

MR. ROSS: Thank you, Your Honor. I am not used to a microphone. Am I picking up?

THE COURT: You are doing fine. I am a little hard of hearing. I need all the help I can get.

MR. ROSS: Very well, Your Honor.

BY MR. ROSS:

Q Good afternoon, Officer DePue.

A Mr. Ross.

Q Drawing your attention to the evening hours of January 5th, 1975, was it on this evening that you took the defendant seated next to me into custody?

A Yes, in the morning hours of that day.

Q About what time?

A Approximately 1:45 a.m.

Q Now, what was your purpose in stopping the defendant?

A I observed erratic driving.

Q When you say "erratic driving," please explain.

A I observed the subject operating his vehicle at the left center line of the roadway.

Q Where were you located at that time, Officer?

A I was eastbound on Interstate 80 approaching Lagoon Valley.

[5] Q Where was the defendant's vehicle

located?

A Vehicle was eastbound on Nelson Road parallel to Interstate 80.

Q When you first observed the defendant's vehicle, approximately how far away from him were you?

A I was parallel to his vehicle at that time, approximately five or six hundred feet.

THE COURT: Let me interrupt a minute. Is Nelson Road -- is that where the new Remark Restaurant is?

THE WITNESS: It's the road -- frontage road to the freeway just north of Howard Johnson's from North Texas.

THE COURT: All right.

THE WITNESS: On the right side, going east.

THE COURT: Completely open parcel for about a mile or more.

THE WITNESS: Yes, Your Honor.

THE COURT: All right. I know

where it is.

BY MR. ROSS:

Q How long did you remain on Interstate 80 before pursuing the defendant's vehicle?

A We exited from Interstate 80 at the off ramp parallel with his vehicle at that time keeping him in sight. We then approached perpendicular to his direction of travel on Lagoon Valley Road and where he brought his vehicle to a stop first.

Q Was the defendant's vehicle in visual -- did you have visual contact with the defendant's vehicle at all times?

A Yes, I watched his vehicle the entire time.

Q Now, what was the first -- what was your first observation [6] with regard to the erratic driving?

A First noted that he was traveling at a slow rate of speed in a 55 mile per hour zone. I estimated about 30 hours [sic] an hour.

Q Was this while you were still on 80?

A Yes. I watched the vehicle travel to the left of this center line, approximately full width of the vehicle, until his right tires were at the center line while approaching the first curve prior to the stop sign.

Q Was this the only indication of erratic driving that you had at that time?

A Yes.

Q Were there other indications later?

A Yes. After regaining the vehicle -- bringing the vehicle back on its own side of the roadway, he drifted out again after that. This would be in -- just prior to the second portion of the S curve.

Q You were still on Interstate 80?

A No, I believe we were on the off ramp.

Q At the time the vehicle drifted the second time? A Yes.

Q What did you do then?

A We were still exiting the freeway at that time and we aproached his vehicle on Lagoon Valley as it came to a stop northbound, Nelson Road.

Q Did you stop the vehicle?

A No.

Q Now, after you observed the vehicle stop, I take it at that time you pulled in behind the vehicle?

[7] A No. He then crossed Lagoon Valley Road and continued northbound -- or east-bound on Nelson Road.

Q Did you follow it at that time?

A Yes, from that point.

Q How long, Officer, did you follow it?

A In time or distance?

Q Both.

A OK. We followed it around the first curve. As you leave Lagoon Valley Road, it would be approximately, I would say, just short of a quarter of a mile.

Q How long in time would you say that

was?

A Oh, I would say maybe seven, eight seconds, around like that. It was well under a quarter of a mile, around that.

Q What was your purpose for stopping the vehicle?

A To determine why it had left -- was operating outside of a marked road lane.

Q Now, at that time would you please describe how you stopped the vehicle?

A We turned on the light bar on the patrol unit, which was a red and blue light, and we activated the white spotlight to the front. The subject vehicle pulled over.

Q Did the defendant's vehicle pull over immediately?

A Essentially, yes.

Q Before I forget, the second time that the defendant's vehicle drifted across the center line, how far did it drift on that occasion?

A I would say approximately three feet.

Q. So that -- it was not as big of a drift as the first time?

[8] A That is right.

Q There were no other indications of erratic driving other than the drift?

A And the slow speed.

Q And the slow speed. Did you exit your vehicle upon stopping defendant vehicle.? A Yes, I did.

Q Did the defendant exit his vehicle?

A Yes, he did.

Q Would you please explain what transpired?

A Upon the stop, the defendant left the vehicle immediately, came walking back to the patrol car. I met him approximately half way between the two cars.

Q Did you determine at that time the reason for defendant's erratic driving and slow speed, comparatively slow speed?

A Not at that time, no.

Q Officer, at that time did you pursue questioning of the defendant?

A I asked the defendant at that time for his driver's license.

Q Did he produce the license?

A Yes, he did.

Q Did it appear to be a valid license?

A Yes, it did.

Q What did you do then?

A I then asked him for the registration for the vehicle.

Q Did he produce that?

A Yes, he did.

[9] Q Now, at the time that you met defendant midway between your vehicles, was it your intention to make an arrest of the defendant? A At that time?

Q At that time? A No.

Q Was this more or less a routine check, then?

A No, it was -- I was trying to determine why he had left the marked roadway.

Q Did defendant ever state a reason to you why?

A He left the roadway at that time?

Q Yes.

A I recall him stating that he was lost and that he was trying to find out where he was. I don't recall any specific reference to the movement.

Q Now, what did you arrest defendant for initially?

A Driving while under the influence of marijuana.

Q And what was that arrest based upon?

A Based upon his agility and demeanor at the time and upon the strong odor of burned marijuana within his vehicle, and the observation of rejected refuse from -- when he vomited on the roadway.

Q Officer, were there any overhead lights on that segment of the roadway?

A No, no.

Q Would you please describe the weather?

A The weather was foggy and very cold.

Q You say you smelled -- when did you smell the burned [10] marijuana?

A I first noticed it when he entered his vehicle to obtain a registration card.

Q Where were you positioned at that time?

A I was positioned directly behind him, approximately three feet, four feet.

Q Were you accompanied by anyone that evening?

A Yes, I was.

Q Who was that?

A Sgt. Stoltz.

Q Now, when you approached the car, where was Sgt. Stoltz at that time?

A As we walked up to the car, or --

Q Yes.

A I believe he was at that time on the right side of the subject's vehicle.

Q You were on the left?

A Yes.

Q Now, at what instance did you first detect the odor of marijuana?

A My first indication of it was after the door was opened.

Q What did you do at that time?

A I took the subject's registration card, which he handed me, and then placed him in a search position at that position of the vehicle.

Q Did you conduct a search of the defendant?

A I gave a pat search to the defendant.

Q A weapon search?

[11] A Yes.

Q Were any weapons found?

A No. The only thing discovered at that time was a vial of liquid, hard vial of liquid.

Q Please describe that vial?

A A clear glass jar of -- with a black top.

Q Did you have occasion to examine

that vial?

A Yes, I took it -- I didn't know what it was when I took it in possession.

Q Did you ever determine what was in that vial?

A No, sir, I didn't.

Q Did you have occasion to smell it?

A Yes, I did.

Q Could you describe the smell, please, for us?

A Repugnant.

Q Very descriptive.

THE COURT: Repugnant?

THE WITNESS: Repugnant.

THE COURT: Oh, repugnant.

THE WITNESS: Yes, it was a very rotten smelling vial.

BY MR. ROSS:

Q What procedure did you begin at that time?

A I then entered the subject's vehicle to look for contraband.

Q Did you find anything else other than the vial on the pat down?

A Not that I recall.

Q Is it at this point that you entered the vehicle? A Yes.

[12] Q And what did you -- would you describe your procedure at that point?

A I entered the vehicle at the driver's door and I observed a pair of surgical type of tweezers laying on the seat.

Q Did you observe anything else at that point?

A At that point I removed -- I picked the tweezers up. I was looking into the vehicle. I observed another set of tweezers on the dashboard, and at that time I left the vehicle again.

Q Did you have occasion to ask defendant the purpose of the tweezers?

A No, I don't recall.

Q Was there anything unusual about the tweezers? A No.

MR. ULDALL: Excuse me. Which pair of tweezers are you referring to?

MR. ROSS: The paid that the officer found on the seat.

MR. ULDALL: On the seat. OK.

BY MR. ROSS:

Q Did you continue your search at that point?

A Yeah. I observed -- I hadn't picked up, other than the first pair of tweezers and at that point then I felt the vehicle move while I was in it and I exited.

Q Did you determine what caused the movement?

A Yes, the subject was becoming ill.

Q Now, did you have any discussion with the defendant at this point?

A I didn't. My Sergeant did.

[13] Q Did you ever determine why defendant became ill at that point?

A No, I didn't.

Q Did anyone, to the best of your knowl-

edge?

A We asked -- I believe the Sergeant asked him if he had taken anything that would be detrimental to his life?

Q Did you hear a response?

A At that point?

Q Yes.

A Yes.

Q What was the response?

A He was complaining about the fact that his car was running and the gas was making him sick.

Q Where was the defendant positioned at that time?

A Upon his response?

Q Yes.

A He was seated in the middle of the roadway.

Q Where was he immediately before?

A Alongside of his vehicle at the -- just at the edge of the left rear -- rear door.

Q Would that be the exhaust side of the vehicle?

A No, the rear is the exhaust of the vehicle.

Q Of your own recollection, do you recall which side in the rear of the vehicle the exhause pipe is on?

A I have no recollection.

Q Would it refresh your recollection if you were told that it was on the left side? A No.

[14] Q Now, did you find anything else in the front seat area besides the pair of tweezers?

A In that area I located a hand-rolled cigarette on the floor at the left edge of the front seat.

Q When you say "left hand" --

A On the floor by the seat adjustment location.

Q And was there anything else found?

A Another set of surgical tweezers

with a burned hand-rolled type of cigarette still clamped in them and an electric type alligator jaw clamp was located on the stereo speaker, on the controls.

Q What was the defendant's demeanor at that point?

A Well, after -- after defendant had become sick, we moved him to the right rear of his car and I had gone back to his vehicle. He was perspiring profusely, obvious all over his face. He was swallowing rapidly. He had a rather "I don't care" attitude to him, euphoria sort of state.

Q Did you re-enter the car at any time after having moved the defendant?

A Yes, after having moved the defendant, I did re-enter the vehicle.

Q What had you found up to this point before re-entering?

A I believe prior to re-entering the vehicle, I found the tweezers.

Q Both pair?

A Yes, both pair were observed, I believe. I only picked up one pair prior to the second entry. I observed the second pair. I hadn't pulled them away yet.

[15] Q And the hand-rolled cigarette was before the second entry?

A See what point I handcuffed him. I believe I observed the hand-rolled cigarette after returning from handcuffing.

Q Would this be on the second entry then?

A No, the subject was placed back to the rear of the vehicle for his own safety just prior to the second entry.

Q Was he handcuffed at that time?

A No, he wasn't.

Q He was not yet handcuffed?

A No.

Q When was he handcuffed?

A After I had entered the vehicle the second time and located more of the contra-

band, I was called back out by the Sergeant and stating that for both our safety, it would be a good idea to handcuff him at that time due to the fact he was becoming scared and he was getting a rather wild look on his face at that time.

Q When you say "wild look," please --

A Eyes very wild. He looked frightened.

Q A frightened look?

A. Yes.

Q Did defendant state why he was becoming frightened?

A He stated he didn't want to take a fall for this.

Q For this?

A That was it.

Q Now, when you re-entered the second time, would you please describe your procedure?

A I re-entered the vehicle after handcuffing him and was [16] looking through the vehicle at that time when I was re-

called again by the Sergeant.

Q What was the purpose of the Sergeant calling you?

A Apparently during the time that I was in the vehicle, the subject had made a statement to the Sergeant, what we were looking for was inside the rear of his vehicle.

Q At this point, this is when you went to the rear of the vehicle, or --

A He was placed in a patrol car at that time and then I went to the rear of his vehicle.

Q Going back to the search of the front portion of the automobile, first by way of foundation, I will ask you this, Officer --

How many times did you actually re-enter the vehicle?

A I actually entered the front portion of the vehicle three times.

Q On the second portion, please list

what you found -- I'm sorry -- on the second entry?

A Second entry -- on the second entry, I had looked over the back seat area and I observed a cake-type tin lying on the floorboard on the right side of the vehicle. I retrieved it at that time.

Q When you say retrieved, you removed it from the vehicle?

A Yes, I picked it up.

Q How many officers were present at this particular time?

A Two.

Q Still yourself and Sgt. Stoltz?

A Yes.

[17] Q Did other officers assist any time?

A Did other officers --

Q Excuse me. At any time prior to the completion of the search?

A No.

Q Other than what you have stated -- withdraw that. In the period when you

were following or observing and following the defendant's vehicle, did you note any movement toward the back seat?

A No, I didn't.

Q Did you notice any unusual movement at all? A No.

Q Whereabouts in the back seat was the tin?

A On the floorboard.

Q Exposed? A Yes.

Q Did you have occasion to open that tin? A Yes, I did.

Q Before going into that, could you describe the tin?

A The tin appeared to be a fruitcake type tin or candy tin with a painted scene on the outside, was red in color.

Q Could you see through it?

A No.

Q Did it appear to be disproportionately heavy when you picked it up?

A No, very light.

Q Very light. Could you hear any rattling in it?

A Yes.

[18] Q What did it sound like?

A BB's.

Q Did you open it to determine what these BB's were?

A Yes.

Q Did you find any BB's?

A No.

Q Find anything that looked like BB's?

A Seeds.

Q What else was in the tin, Officer?

A It was also a plastic baggie and containing a green vegetable matter, a flower -- with flower type buds and cigarette papers, two packs of cigarette papers.

Q In light of the previous events, did it surprise you at all to find what you found inside of the tin?

A Surprise? No.

Q When defendant stated, "What you

were looking for was in the back," was that the first comment that he had made?

A I couldn't say. I wasn't with him the entire time.

Q During the time that you were with defendant, did he engage in conversation with you?

A Yes.

Q Could you tell us the substance of that conversation?

A In essence, I believe he stated he was lost, he was looking for Interstate 5; he was trying to get to Los Angeles.

Q Was this prior to your approach of his vehicle?

A Yes.

Q In other words, this was still while you were on the roadway between your vehicles? [19] A Yes.

Q Now, after having smelled the odor of burning marijuana, did defendant engage in further conversation with you, with

you personally?

A I don't recall.

Q Officer, did you have occasion to radio in your stop on the patrol vehicle?

A At one point.

Q At the point of making your stop?

A No.

Q When is the first time that you radioed headquarters to advise --

A After finding the contraband in the rear of the vehicle.

Q I'm sorry, officer. Did I ask you the time of the stop?

A The time of the stop?

Q Yes.

A No, you didn't.

Q Well, what was the time of the stop?

A Approximately 1:45 a.m.

Q Approximately how long would you say the search process took from the time that you first detected the odor until the time you discovered the contraband

in the rear portion, approximately?

A I would estimate roughly maybe ten minutes, fifteen minutes.

Q When you exited your vehicle, Officer, how fast would you say you approached defendant vehicle?

A At a normal walk.

Q Did it appear that the defendant was -- was the defendant [20] approaching you faster than you were approaching him?

A Yes.

Q Did he appear to be nervous at that point?

THE COURT: Let me interrupt you. How long is this going to be. We have all our appeals on this afternoon. The judges are waiting.

MR. ROSS: Very well, Your Honor. I will try to move right along.

THE COURT: All right.

BY MR. ROSS:

Q Officer, did you say that defendant

had made no comment to you other than the first explanation of why -- of his being lost?

A I recall that comment only, yes.

Q You recall no further conversation whatsoever?

A Not at that time.

Q At any time?

A Subsequent to arrest, there was considerable conversation, yes.

Q When was the arrest in time?

A The exact time?

Q Roughly your best estimate?

A I would estimate probably around, in my mind, in my opinion, the arrest of the subject was after I smelled the burned odor of marijuana.

Q Now Officer, you prepared a police report; is that correct?

A That is right.

Q Do you have that with you?

[21] A Yes, I do.

Q At what point did you advise the defendant of his rights?

A He was advised of his rights approximately 0215 hours.

Q At what point in time was that with regard to the search?

A Approximately 30 minutes after the initial stop. I estimate probably -- probably ten minutes after the initial location of the contraband.

Q How long after defendant stated that, "What you're looking for is in the back"?

A He made that statement prior to being admonished of his rights.

Q That statement he did?

A Yes.

Q About how long before, would you say?

A Ten minutes, I would estimate.

Q Until that time then defendant had not been advised of his rights?

A No, he had not.

MR. ROSS: I have no further questions at this time, Your Honor.

THE COURT: Cross-examine.

DIRECT EXAMINATION

BY MR. ULDALL:

Q Officer DePue, what training have you had in identifying the odor of burned marijuana?

A I received training through the California Highway Patrol Academy in Sacramento. I received that particular type of training three times.

[22] Q Could you describe how this training was conducted, please?

A They conducted a course on visual and sense of smell, recognition of marijuana.

Q Has marijuana been burned in your presence?

A Yes, it has.

Q Then did you smell the odor this burned substance gives off?

A Yes, we do.

Q You have been with the C.H.P. how long? A In my eighth year.

Q How many times have you smelled what appeared to be the odor of burning marijuana on the job, approximately?

A I would estimate at least 50 times.

MR. ULDALL: That's all I have by way of cross, Your Honor.

THE COURT: All right.

MR. ROSS: Nothing further, Your Honor.

THE COURT: All right. You may step down, Officer.

THE WITNESS: Thank you.

THE COURT: Next witness?

MR. ROSS: Yes. May we call Sgt. Stoltz to the stand?

THE COURT: All right.

RICHARD STOLTZ,

having first been duly and regularly sworn to tell the truth, the whole truth and

nothing but the truth, testified as follows, to wit:

DIRECT EXAMINATION

BY MR. ROSS:

[23] Q Good afternoon, Sgt. Stoltz. You have been present in the courtroom while Officer DePue has testified; is that correct?

A Yes.

Q Did you hear the questions and his response? A Yes.

Q Is there anything that you would disagree with in Officer DePue's testimony?

A No.

Q Were Officer DePue's statements substantially the same as your own recollection would be? A Yes.

Q Now, Sgt. Stoltz, I believe, based upon Officer DePue's testimony, that you were present with the defendant while Officer DePue searched; is that correct?

A Yes.

Q And it was to you then that the de-

fendant made the comment, "What you're looking for is in the back." Is that correct? A Yes.

Q Now, you had not advised the defendant of his Miranda rights, had you?

A No.

Q Did you take part in any way in the search of the front portion of the vehicle?

A The only part that I could describe as taking any active part in was visually observing through the right front window as Officer DePue returned to the left front for the purpose of getting registration from the defendant, and at that time I did see the surgical type tweezers laying on the front seat, and [24] then I went around front of the car as the defendant opened the door and I also smelled the burning of marijuana.

Q Did you have occasion to see the tin in the back seat? A No.

Q You did not see that?

A No.

Q Were you present when Officer DePue opened the tin?

A Yes.

Q Do you recall at approximately what point in time that was from his retrieval of it from the car?

A To the best of my recollection, it was at the second entry. However, my primary concern at the time that the tin was discovered, as I remember, was the condition of the defendant, because he was down on his knees on the roadway vomiting and I was afraid that he may have ingested something that could conceivably be injurious to his health and safety.

Q I believe there was mentioned in preliminary hearing concerning defendant becoming ill. Defendant became ill; is that correct?

A Yes.

Q When he was -- after he had been positioned against the car?

A Yes.

Q Did you have occasion to observe the refuse after defendant did become ill?

A Yes.

Q I believe there was testimony about specks in the refuse; is that correct?

A I don't know what the specific description was, but there [25] wasn't very much.

Q Was a determination ever made?

A. No. That was never removed and analyzed.

Q Did you also have occasion to smell the vial, smell the liquid in the vial?

A Yes.

Q I take it, you concur that it was vial? A. Putrid.

MR. ROSS: I have no further questions at this time.

CROSS-EXAMINATION

BY MR. ULDALL:

Q The defendant's statement, "What you're looking for is in the back," was that in response to a question by you or Officer DePue?

A No, no. No questions directed at the specific violation already being observed were asked -- in other words, no incriminating questions were asked of the defendant at this time.

MR. ULDALL: That's all I have, Your Honor.

THE COURT: All right.

MR. ROSS: Yes, Your Honor. I have merely a couple of other questions.

REDIRECT EXAMINATION

BY MR. ROSS:

Q Sergeant, do you recall any statement prior to that of defendant with regard to contraband in the car?

A Not with regard to contraband, no.

MR. ROSS: Thank you. No further

questions.

[26] MR. ULDALL: Nothing further.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Anything else?

MR. ULDALL: No, I have nothing else, Your Honor.

MR. ROSS: Yes, Your Honor. I wonder, a procedural point, since the preliminary hearing transcript has been entered, I assume that the evidence will also be considered at this time for purposes of this proceeding.

MR. ULDALL: Yes, I would so move.

THE COURT: All right. It will be received.

MR. ULDALL: Under the same numbers they were marked at the preliminary hearing.

THE COURT: Anything else?

MR. ROSS: Yes, Your Honor. I

might inquire whether the vial of liquid is present. I don't believe that was introduced at the preliminary hearing. I never had an opportunity to examine it.

MR. ULDALL: The vial is present. The reason why it wasn't introduced at the preliminary was, we couldn't prove it was any narcotic controlled substance.

THE COURT: Your answer, you got to give it back, or whatever you are going to do. All right.

MR. ULDALL: Give it to him.

THE COURT: Do you have any further use for it?

MR. ULDALL: No, I have no further use for it.

THE COURT: Was it tested?

MR. ULDALL: Yes, it was tested. I have a copy of the [27] report. No narcotics, or --

THE COURT: Not concerned then.

MR. ULDALL: I would be willing

to submit the matter.

MR. ROSS: Yes, Your Honor, submitted. Will the Cout entertain argument at this point?

THE COURT: Argument?

MR. ROSS: Yes.

THE COURT: Sure.

MR. ROSS: Your Honor, based upon the testimony established in the preliminary hearing, together with the supplemental testimony presented today, we would ask that all evidence, all tangible evidence be suppressed.

THE COURT: Why?

MR. ROSS: I might point out, Your Honor, that according to the testimony, I think we obviously had, at least, a custodial interrogation, or custodial situation. By the Officer's testimony, defendant never was advised of his Miranda warnings, one of those warnings, of course, being that, "You have a right to

remain silent. Anything you say can and will be used against you," which I think is very, very important to the evidence now before us.

By the testimony, defendant had stated that, "What you're looking for is in the back."

THE COURT: That was not in response to any question.

MR. ROSS: Your Honor, without the initial warning, that "You have the right to remain silent," unless the defendant is advised that he has the right to remain silent --

THE COURT: He was not under arrest at the time.

[28] MR. ROSS: I believe, Your Honor, that the testimony of Officer DePue establishes that defendant was under arrest at the time of being placed against the car.

THE COURT: Wait a minute. Are you saying that the Officer omitted giving

him that portion of the Miranda rights? We all understand that is your point, that he didn't tell the defendant that he had a right to remain silent.

MR. ROSS: That is correct, Your Honor.

THE COURT: Where is the evidence then?

MR. ROSS: No, the defendant, Your Honor -- I might point out that Officer DePue stated that the arrest occurred at approximately 1:45 and that the Miranda warnings were given approximately one half hour later.

THE COURT: He said, "1:45, about." That is his opinion, it was about that time.

MR. ROSS: Well, there is some evidence, however, that we have before us with regard to time.

THE COURT: Let's reconstruct it for a minute. Now, you don't deny that

this was a legal stop, do you? He observed the man violating the Vehicle Code Provision, on the wrong side of the road, driving 30 miles an hour in a 50 mile an hour zone, and he sees him twice, sees him over the road weaving twice. Certainly have the right to stop him. They stop him. He stumbles out of the car. He comes back, and at 1:45 in the morning, as any experienced officer will tell you, that is something to alert him. Nothing has happened at that point.

MR. ROSS: Might I respond to this point so far?

THE COURT: Yes.

[29] MR. ROSS: We also have established through the testimony that the visibility that night was approximately a quarter of a mile. The preliminary hearing transcript, Officer DePue stated that, "Defendant's vehicle was approximately a quarter of a mile away." Therefore, at the fringe of

visibility.

THE COURT: That is something for the jury to determine, isn't it?

MR. ROSS: I am merely resonstructing what the Court pointed out. The other consideration, next when the vehicle was pulled over, I believe the only testimony was that there were two instances of going over the divider line in a fog. Once having stopped, defendant did state an explanation; in other words, there was no further conduct. With regard to the jumping out of the vehicle, I think it has been firmly established, at least from the testimony of the preliminary hearing transcript, that Officer DePue met defendant half way, so that if defendant jumped out, they must have been traveling at the same speed to reach the point in the middle. I would suggest to the Court that this should not be persuasive with regard to any establishment of prob-

able cause, the exiting of the vehicle. We have to at least assume that the officer exited his vehicle in a normal manner, and in light of the testimony, we might conclude that defendant also exited, at least in a normal type fashion.

With regard to speed and the description --

THE COURT: The testimony here, Officer DePue kept him in sight at all times at a slow rate of speed that he estimated, 30 miles an hour.

[30] MR. ROSS: Which is not -- would not -- would not seem to be a factor, at least, Your Honor, establishing probable cause on a foggy evening. As a matter or fact, it would seem quite reasonable for a driver to drive slower on a foggy night. It might actually be -- it might be very unreasonable for a party to drive at 50 miles an hour through a fog when he is lost, which was the testimony of the

statement --

THE COURT: I can understand your point, but for purposes of passing upon reasonable and probable cause, this Officer has been on the force eight years. It is his sworn duty to get out and patrol the highway. When he says he gets the man in sight at all times, is as far as I can go. I can't weigh that. You might say -- you are saying "foggy." You are asking me to make a decision now, to weigh the evidence. I can't do that on this kind of a hearing.

MR. ROSS: Your Honor, we are in a suppression hearing.

THE COURT: That is right.

MR. ROSS: The Court is also the finder of fact, as well.

THE COURT: We have no evidence to the contrary. You are asking me to -- you are describing it, "foggy." How do you know? Did you see him?

MR. ROSS: By the testimony of the Officer. Actually, the point is that -- that we actually do not have to consider or even reach that point. That it would appear that since defendant was taken into custody upon the detection of the odor, he was taken in custody, that his Mrianda rights would attach at that time, and unless he had been advised of his right to [31] remain silent -- if I might construct it this way, Your Honor -- the bulk of the contraband was found in the rear portion of the car. Prior to it being found, defendant stated, "What you're looking for is in the rear of the car." The officers testified that they then, after that statement, went and looked in the rear portion. The preliminary transcript goes through the exact procedure, prior to that time, between the time of that statement and the time -- between the time of being taken into

custody and that statement, defendant had not been advised of his Miranda warnings. I think the Court can take judicial notice that the normal procedure, of course, is to advise of the Miranda rights.

THE COURT: Let me get you straight. The minute that the door was opened, the officers smelled the burning marijuana, they had a duty right there and then to advise, give him his Miranda rights; is that right?

MR. ROSS: No, that is not it. The duty attaches, not upon the detection of the odor, the duty attached when defendant was spun around, placed against the car and taken into custody. Now, if the Court has trouble at that point, I think defendant was handcuffed prior to the statement. That is certainly a custody. You dan't get too much more into custody than being handcuffed and placed in a patrol vehicle. The point, it would

seem, is that the attachment of the Miranda rights would come -- would be when defendant spun around, placed up against the car. That is custody, a restraint of physical freedom, which actually, technically is the pont of arrest, any restraint of physical freedom, whether it be arrest for interrogation or [32] arrest for a crime. That is an arrest at that point, is when the duty would attach, the crucial part being that the duty or the right to remain silent, which is, of course, the first, I believe, always the first stated of the Miranda rights.

THE COURT: Under Terry vs. Ohio, 1:45 in the morning --

MR. ROSS: I'm not sure if I am showing the Court --

THE COURT: Let me ask you; what is your position about what point must they give the Miranda rights under the circumstances of this case, that we have

in evidence so far?

MR. ROSS: Under the circumstances, the Miranda rights attached when there are factual situations zeroing into a particular person. At this time it would appear that -- I'm sorry, Your Honor -- I forgot the last question the Court --

THE COURT: Take your time.

MR. ROSS: What was the question again?

THE COURT: Gee, I don't remember. Start over.

MR. ROSS: All right. Let's go back to the beginning. The point -- oh, I know -- it was when you were asking, Your Honor, when that right attached.

THE COURT: Yes.

MR. ROSS: My response was that the rights attach when the factual situation is such that the officers are looking toward the individual, in this case, the defendant, as a potential defendant for a

crime; in other words, it is not the situation, it is not the application, say, of Terry v. Ohio, where the -- where the questioning begins in more of a general sort.

If I might give an example, I think I can make the [33] point better by example. Your Honor, for instance, if I were walking down the street outside this courtroom and an officer came over and he started asking me questions, he said, "Did you see a car go by? Where are you coming from? Where are you going?" I would be responding.

I would say, "Well, I'm going to my vehicle. I'm going to my car to go home. I just came from the courthouse." No doubt at this point for the officer to advise or to give me the Miranda warnings, because at that point he would be looking toward me as a potential defendant. He would be in the area of in general

investigation. However, that is not our case here. Our case here is, we have an element of probable cause, when the car door is opened, the smell of burned marijuana.

THE COURT: If you are trying to indicate what happened here, we have the man jumping out, being asked for his driver's license, registration card. He goes back to the door, opens his door. Officer DePue is three or four feet behind him. Here comes a cloud of marijuana smoke.

MR. ROSS: Well, I don't know how big a cloud it was.

THE COURT: He remembers his days at the academy. He says, "That is marijuana."

MR. ROSS: We have no problem with that; in other words, if the Court -- I don't mean to imply that the duty to advise Miranda attached when they met mid-

way and he said, "Can I see your driver's license." Actually, I never really gave that much thought, but we are concerned with our facts now before us. It is more than a hypothetical. There was an element of probable cause, after all of that initial driver's license, etc, [34] and when the door was opened, the cloud of marijuana comes out. Now, that would be reason for the officer to zero in on the defendant, specifically.

THE COURT: Let me ask you a question. Keep your thought.

MR. ROSS: Yes, sir.

THE COURT: Was this a legal stop? Remember, talking about fog and all that, for purposes here of the 995 Motion, reasonable cause? The Magistrate has said there was reasonable cause. He heard the testimony.

MR. ROSS: For the search, yes.

THE COURT: I take judicial notice

of that road there. Every part he has talked about, I know that road very well up there.

MR. ROSS: Is the Court asking me for black letter law, or my thoughts?

THE COURT: Just under the circumstances of this case, was that a legal stop, to start with? Maybe we had better put it this way. I think it was. So now --

MR. ROSS: Of course, Your Honor, when you ask a question like that, I am defense counsel, so I am thinking. Assume that it was a legal stop. For purposes of argument here, I am quite willing to assume that it was a legal stop. That is not the point that I am having difficulty with. I am having difficulty from the cloud of marijuana, from that point of the opening of the door, detection of the odor of marijuana and the failure to advise Miranda at that point, and then,

referring to the more or less standard type arrest search procedure --

THE COURT: Do this; we got a man champing at the bit. [35] What is your position?

MR. ULDALL: First of all, Your Honor, I see no problem with the stop. It was a legal stop.

Secondly, as far as Miranda, even if I conceded the defendant was in custody when he made the statement, which he was, it was a completely voluntary statement. Sgt. Stoltz testified the statement, "What you're looking for is in the back," was not in response to any question put to him by Sgt. Stoltz or by Officer DePue. Assume that response, or the statement was in response to a question, after Officer DePue had made that initial observation, the smell of marijuana, the tweezers on the seat, tweezers with a marijuana cigarette on the dashboard, the cigarette

on the left floorboard, the tin with marijuana seeds and the bag of marijuana, he had the right to keep on searching anyway. Knowing Officer DePue, he would search. He's like a gopher out there.

THE COURT: No wonder the defendant was sick. He just had -- he had a marijuana cigarette in each hand, looked like.

MR. ULDALL: Even assuming the statement would not have been made, he still had the right to keep on searching.

THE COURT: I shouldn't have said that. That sounds like a flip statement. I don't mean that. This is a serious matter. Anything else?

MR. ULDALL: I will point out, this vehicle involved, as the Court is aware, was a station wagon.

MR. ROSS: I think I can see what Mr. Uldall is driving at. This was a station wagon, or without a trunk, etc.

However, I don't think we have to reach that. It may help the Court to [36] point out, that although I can't read the date here, my memory is a little foggy, I remember the case came out in the last couple of months, People vs. Parker, with regard to a murder conviction, a little more serious than this offense, and it is very interesting that part of the language reads, "That the burden is upon the prosecution to establish that a confession obtained after Miranda rights had been asserted by the suspect as a result of change of mind, prompted by the advise of counsel, his own psychological makeup, or similar situation."

There are two points there. The first, we are not actually dealing -- we are dealing, in a sense, with a confession, at least an adverse statement. Now, it seems to follow that the rights must be given, if that is the status of the

law, at least the rights must first be given, and I think the case -- I think we have a lot of case law, at least, that would point in that direction, if not hit it right on the nose. It would seem the facts establish that if Miranda has never been given, because a defendant cannot waive a right that he is unaware of, and it is clear that the prosecution does have a burden of establishing that the defendant did knowingly waive his Miranda rights. Of course, we could never reach that point if the prosecution has never established that the rights were given in the first place. So that it would appear that the search, at least of the rear, was tainted by the circumstances that gave rise to the defendant's statement that led him there.

THE COURT: Let me suggest this; I got the picture now. Unless there is something you really want to urge -- I

got my mind made up. Anything else?

[37] MR. ULDALL: No, submitted.

THE COURT: Anything else?

MR. ROSS: No, submitted, Your Honor.

THE COURT: All right. I have to take the position that this was a voluntary statement, under the circumstances. I hear these all the time up here. I am going to have to deny the motion.

Good fight, Counsel.

MR. ROSS: Very well, Your Honor.

THE COURT: Very well.

MR. ROSS: Where do we stand?

MR. ULDALL: Just to affirm the April 22nd trial date.

THE COURT: All right. Good luck.

MR. ULDALL: I would ask it be stipulated that all evidence can be returned to Officer DePue for safe-keeping.

MR. ROSS: Very will, Your Honor.

THE COURT: All right. That is

the order.

You are Mr. Ross?

MR. ROSS: William Ross, R-o-s-s.

THE COURT: Come again.

MR. ROSS: Thank you.

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No. 80-148

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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did petitioner have an expectation of privacy in the packages in his car so intense that police were constitutionally required to secure a warrant before examining them?

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No. 80-148

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

v.

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Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on March 4, 1980, is appended to the Petition for Writ of Certiorari and may be found at 103 Cal.App.3d 34, 162 Cal.Rptr. 780.[1/]

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1. The Court of Appeal filed two earlier opinions, both unpublished, in this case. The first, filed on June 30, 1976, was vacated by that court's order of July 22, 1977. Petitioner's appeal was reinstated for further briefing and oral argument. Prior to its vacation, petitioner had sought review of this first opinion by

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Court sections 1257 and 2101. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and of driving under the influence of a drug, by an information filed on January 23, 1975 (CT

Footnote 1: (Continued)

petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). Following a response by the State of California, this Court denied the petition.

After reinstatement of the appeal, the Court of Appeal filed a second opinion on

8-9).[2/] Petitioner pleaded not guilty (CT 11), was tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5).

Footnote 1: (Continued)

May 9, 1978, and amended it on May 22, 1978. After denial of a hearing by the California Supreme Court on July 5, 1978, petitioner sought review in this Court by petition for writ of certiorari filed on October 3, 1978 (No. 78-567). On June 25, 1979, this Court granted the writ, vacated the decision of the Court of Appeal, and remanded the cause for further consideration in light of Arkansas v. Sanders, 442 U.S. 753 (1979). 443 U.S. 903.

2. "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings; "PHT" refers to the Transcript of the Preliminary Hearing.

As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left--was operating outside of a marked road lane." (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership registration

(RTS 9).[3/] Petitioner, perspiring profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat searched Robbins for weapons (RT 42; RTS 10), finding only a vial of malodorous liquid (RTS 11, RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed

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3. California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffice regulations.

on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz, "What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the back of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of

the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered, Robbins was advised of his Miranda rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this," (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

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ARGUMENT

THE WARRANTLESS SEARCH OF PETITIONER'S PLASTIC PACKAGES FOUND IN THE TRUNK OF HIS CAR WAS REASONABLE.

Petitioner contends that the warrantless search of the green wrapped plastic blocks found in the trunk of his car violated the Fourth Amendment, as construed in Arkansas v. Sanders, 442 U.S. 753 (1979). In Sanders, this Court held "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other situations." Id. at 766. For the reasons which follow, respondent submits that the petitioner's reasonable expectation of privacy in the plastic bags could not be so intense as to require the police to secure a warrant. Accordingly, it was reasonable for the officers to have searched the plastic-wrapped parcels[5/]

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5. Police also searched and found marijuana in a cookie tin located in the passenger compartment and a tote bag situated in the trunk. The marijuana found in these receptacles was suppressed. 103 Cal. App.3d at 41; 162 Cal.Rptr. at 783-784.

based upon the probable cause to believe that they contained contraband.

In Sanders this Court expressly noted:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." Id. at 764-765 n.13.

The dispositive question in this case, then, is whether petitioner had a reasonable expectation of privacy in the plastic bags,

which expectation required the obtaining of a search warrant.

Katz v. United States, 389 U.S. 347 (1967), established that the Fourth Amendment conferred upon persons expectations of privacy against police invasion into certain areas. Id. at 353. The late Justice Harlan perceived search questions to be governed by "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361 (Harlan, J., concurring); accord, Rakas v. Illinois, 439 U.S. 128, 143-144 n.12 (1978). Although there has never been an express finding, we assume that petitioner had a subjective expectation of privacy in the plastic bags. Resolution of this case turns upon whether society is prepared to recognize that expectation as "legitimate" or "reasonable." "The focus

in all such cases is on the party's reasonable expectation of privacy in a particular item, a concept which has been elaborated on in the case law." United States v. Gooch, 603 F.2d 122, 126-127 (10th Cir. 1979); accord, United States v. Mackey, 626 F.2d 684, 687 (9th Cir. 1980). This inquiry, of course, is legal rather than factual. United States v. Mackey, supra.

There are two related reasons why petitioner's expectation of privacy in the plastic bags did not require the obtaining of a warrant. First, a green plastic bag (probably designed and sold for the transportation of garbage) is normally not intended "to serve as a repository for personal items. . . ." Arkansas v. Sanders, supra, at 664. As the Mackey court said of a paper bag, it "is among the least private of containers. It is easily torn, it cannot be latched, and, to a greater extent than most containers, its contents can frequently be discerned

merely by holding or feeling the container." 626 F.2d at 687; accord, United States v. Jimenez, 626 F.2d 39, 40-41 (7th Cir. 1980); United States v. Gooch, supra, 603 F.2d at 126-127 (plastic sacks); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (cardboard box); United States v. Gaultney, 581 F.2d 1137, 1144-1145 (5th Cir. 1978); People v. Diaz, 101 Cal.App.3d 440, 447-448, 161 Cal.Rptr. 645 (1980) (plastic cup).

United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), is factually inapposite, involving a taped cardboard box, and legally incorrect. The court found that the defendant had a subjective expectation of privacy in the box, but totally failed to analyze whether that expectation was reasonable.

Second, this Court recognized in Sanders that the contents of a container may be inferred from its outside appearance. 442 U.S. at 764-765 n.13. This Court recognized earlier that the shape, design, and weight of a package may provide a definite

clue about its contents. Henry v. United States, 361 U.S. 98, 104 (1959). Relying upon the testimony of the arresting officer (PHT 24), the California Court of Appeal concluded that the "bulky tape-secured packages do not present an appearance of containing anything other than contraband." 103 Cal.App.3d at 40, 162 Cal.Rptr. at 783. For this additional reason, then, petitioner could not reasonably expect police to secure a warrant before searching a package which plainly appeared to contain contraband.

Petitioner's essential position lies in his exhortation to this Court "to hold that there is a reasonable expectation of privacy as to all private property seized in an automobile unless the property falls within the 'plain view' exception of the Warrant Clause." Pet. for Cert. at 19. Petitioner's argument ignores human experience that certain containers are intended to house one's papers and effects while others are not. This rejection of

experience is, in effect, a repudiation of the second inquiry created in Katz and reiterated in Rakas. Were petitioner to prevail, it would mean that each citizen could decide what expectations of privacy are reasonable without regard to society's norms. Having to rely upon the subjective expectations of the arrestees, often drunk or under the influence of narcotics, police would have no identifiable criteria on which to base their decision whether to seek a warrant. Respondent submits that the Katz formulation should not be disturbed and that, under that test, petitioner had no reason to expect police to obtain a warrant before searching his plastic bags.

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CONCLUSION

For the foregoing reasons, respondent respectfully submits that the petition for writ of certiorari should be denied.

DATED: October 27, 1980

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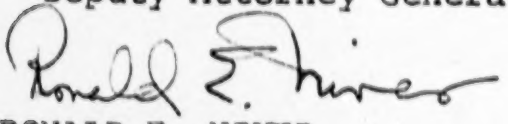

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No. 80-148

IN THE SUPREME COURT
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UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

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Respondent.

RESPONSE TO OPPOSITION

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No. 80-148

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RESPONSE TO OPPOSITION

I

STATEMENT OF THE CASE

Petitioner believes it appropriate to point out that despite the existence of facts from which the argument might be made, the prosecuting authority has never claimed that the challenged search was consented to. Under California law the consent issue is thus out of the case and cannot bar a remedy

petitioner is otherwise entitled to.[1] Lorenzana v. Superior Court (1973) 9 C.3d 626, 640, 511 P.2d 33.

II

NEW DISAGREEMENTS IN THE COURTS OF APPEALS

As stated in Points II and III of the petition, the appropriate Fourth Amendment tests for packages seized contemporaneous with an arrest are subject to diverse and conflicting interpretations. Recent cases exacerbate the problem.

In United States v. Sanders, ___ F.2d ___ (8th Cir., 8/15/80) an opaque brown paper envelope was seized from the floor of an automobile after an arrest. There was probable cause that the arrested parties were dealing in contraband drugs. Appellant

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[1] The Attorney General has not argued consent in this Court either in answer to Robbins' first petition (Robbins v. California (1979) 443 U.S. 903) or in answer to this one. The point must be mentioned, however, because the Attorney General has mentioned certain facts which may suggest that there was consent.

argued that the warrantless search of the envelope was improper as "the incriminating nature of the brown packet was immediately apparent to the DEA agent." A dissenting judge responded:

> Furthermore, the incriminating nature of packet was not immediately apparent. The majority's rather surprising contrary conclusion should give pause to anyone who, for example, uses such packets to carry valuable stamps and coins or receives a watch back from a repair shop in such an envelope. The agents did indeed suspect narcotics traffic in the car, but they would have also suspected that any suitable container in the car, no matter how innocent in appearance, was being used for narcotics.

In United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) (cited by both parties) a new opinion was issued, United States v. Dien, 615 F.2d 10 (1980). The new opinion requires a warrant for closed cardboard boxes when they are sealed with tape. Petitioner's packages were also sealed with tape and were made of heavy plastic, not "garbage

bags" as suggested by the Attorney General. Subjective and objective expectations of privacy are indicated by taping a package and these expectations are given weight by the circuit courts. United States v. Allison, 619 F.2d 1254 (8th Cir. 1980).

On the other hand, the Seventh and Tenth Circuits have recently held that no warrant need be obtained for paper bags or unsealed plastic bags. United States v. Garza-Hernandez, 623 F.2d 496 (7th Cir. 1980); United States v. Montgomery, 620 F.2d 753 (10th Cir. 1980).

We believe these recent cases emphasize our point that warrantless container searches involving automobiles is a volatile subject in state and federal courts.

We note that the Attorney General has failed to respond to our point that the court below did not follow this Court's mandate. There is no response possible as it cannot be denied that the court below

reached out for a totally new ground in re-affirming petitioner's conviction.

Dated: November 7, 1980

Respectfully submitted,

JOSEPH G. BAXTER,

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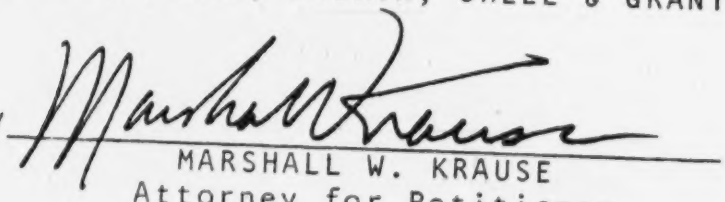
By 
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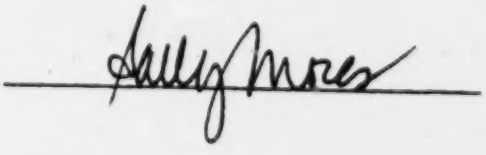
PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, California, in which county the within mentioned mailing occurred, and not a party to the subject cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On November 7, 1980 I served the within Response to Opposition on the respondent to said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully pre-paid, in the United States mail at Larkspur, California, addressed as follows:

Attorney General of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 1980, at Larkspur, California.



No. 80-148

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Are the Fourth and Fourteenth Amendments violated by warrantless searches of sealed packages closed against inspection when such property has been immobilized during a highway stop and arrest?

2. What constitutional limits apply when inferences drawn from the appearance of a package are used to avoid the Warrant Requirement?

3. When this Court settles a search and seizure dispute by vacating a state court judgment and mandating the state court to reconsider its judgment, does the mandate authorize the state court to reinstate its judgment on previously unraised federal grounds which are outside the premises of the case reviewed by this Court and which could have been but were not presented for review?

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TABLE OF AUTHORITIES CITED

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Katz v. United States, 389 U.S. 347 (1967) 13, 14, 36, 37, 39, 41, 44

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TABLE OF AUTHORITIES CITED

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Other Authorities

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349 (1974) . . . 28

LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1980)
Vol. 2, Sections 7.5(b) and (d) 49, 50
Vol. 2, p. 39, n. 102.2 52

Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L.Rev. 1047 (1975) 49

Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U.Chi.L.Rev. 221-222 (1957) 66

Webster's New World Dictionary 29, 33

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55 Harv.L.Rev. 1357 (1942) 65
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No. 80-148

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,
vs.
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Respondent.

ON WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District and the order of the Supreme Court of California on April 30, 1980, denying a petition for hearing, are reproduced in the appendix to the petition for a writ of certiorari filed herein on

July 29, 1980.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1257 and 2101, this being a petition arising out of a state criminal conviction. The petition is filed within 90 days of April 30, 1980.

CONSTITUTIONAL PROVISION AT ISSUE

Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts we state are undisputed in the record unless otherwise indicated.[1]

---

[1] The following designations have been used in this brief: J.A. (Joint Appendix); R. (Reporter's Transcript on Appeal).

THE STOP

On January 5, 1975 at 1:45 a.m., while traveling along Interstate 80 in the foggy and very cold morning hours, Officer DePue of the California Highway Patrol observed petitioner's stationwagon, between one tenth and one quarter mile distant, traveling on Nelson Road. (J.A. 6, 7, 55, 56, 64; R. 65:6-9)

Despite the difficult viewing conditions, which limited visibility to one quarter of a mile, Officer DePue formed an opinion that petitioner was driving too slowly. (J.A. 57) It was later established that this opinion was mistaken and based upon DePue's mistaken belief that the speed limit on Nelson Road was much higher than it actually was. (R. 202:13-28, 229:26-239:9, 240:5-241:19)

Viewing the distant scene in this false light, DePue likewise believed he observed petitioner twice cross over the broken

yellow road line, once three feet and once a full vehicle width. (R. 6:9-16, 7:24-8:4) DePue, however, never testified that his limited view of the distant scene allowed him to determine whether these alleged maneuvers were in violation of law.

Upon exiting the freeway, Officer DePue and his partner, Officer Stoltz, stopped petitioner to question him about his driving. Since the road did not have a shoulder, petitioner's vehicle was stopped in the middle of the right hand roadway. (R. 75:8-19)

Petitioner stepped out of his station-wagon and produced his driver's license. (J.A. 61-62) Asked to produce a registration, petitioner returned to his car and proceeded to look for the registration. (J.A. 62) While the door was opened, Officer DePue detected the odor of burned marijuana. (J.A. 64-65) Immediately upon receiving petitioner's registration, DePue

arrested petitioner for driving under the influence of marijuana. (J.A. 63, 65, 81)

THE AUTOMOBILE SEARCH

A search of the passenger compartment then followed. Several entries were made into the vehicle which yielded evidence to support the basis for the arrest: two pairs of tweezers, one with a hand-rolled cigarette butt, and a cookie tin containing cigarette papers and approximately 1/8th oz. of marijuana. (J.A. 42, 66-67, 76-77)

While this search took place Robbins was kept spread-eagle against his still running car, breathing in the fumes from its exhaust. (J.A. 12, 65, R. 80:17-18) At some point he was overcome by these fumes and fell into the middle of the oncoming roadway, where he vomited. (J.A. 68-69)

Still standing outside in what Officer DePue described as a very cold night,

Robbins was swallowing rapidly and perspiring profusely. (J.A. 71) He began saying irrational things and looked wild-eyed. (J.A. 72-73) He was then handcuffed, and while DePue continued the search, Stoltz questioned petitioner in order to complete a lengthy vehicle impoundment form. (J.A. 18, 35, 71-73) Shortly thereafter, and after Robbins learned of the search of the cookie tin, Robbins allegedly stated to Sergeant Stoltz, "What you are looking for is in the back." (J.A. 74, R. 120:23-25) Robbins was then removed from the cold and placed in the patrol vehicle. (R. 50:8-12)

THE LUGGAGE SEARCH

Removing the keys from the petitioner's ignition, DePue unlocked and opened the tailgate of the wagon. (R. 50:13-15) Picking up the floor rug, DePue discovered a luggage compartment under the floor in the rear deck of the wagon. (J.A. 38-39) Pulling a handle set flush into the deck,

DePue opened the luggage compartment and observed therein two pieces of luggage (a tote bag and a briefcase) and two sealed packages. (J.A. 38-40)

Ignoring the packages, DePue opened up a brown leather tote bag and discovered a masonry jar and three white plastic bags, each of which was double taped. (R. 133: 6-7) After they were opened these items were found to contain a total amount of marijuana in excess of one pound. (J.A. 42)

DePue next removed and opened a brown leather briefcase and rummaged through petitioner's clothing. (J.A. 22-23, R. 54:28-55:9) DePue then removed a package wrapped in opaque green plastic and sealed closed. (J.A. 23, R. 57:20-17)

The package was rectagular in shape and entirely plain, bearing no legend or any other written indicia supporting inferences concerning its contents. As Justice

Rattigan of the Court of Appeal said of a photograph of the package in the record:

> The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any other wholly innocuous items which might be heavy in weight. (Dissenting opinion of Justice Rattigan, p. A-11 of Petition for Writ of Certiorari)

Upon opening this package DePue discovered a block of marijuana weighing approximately fifteen pounds. (J.A. 42) Finally, DePue removed and opened a similar package containing approximately the same amount of marijuana. (Id.)

THE PROCEEDINGS IN THE TRIAL COURT

Petitioner was charged with counts of possession of marijuana, possession of marijuana for sale, transportation of marijuana, and driving under the influence of a drug.

On January 14, 1975, during the preliminary hearing in the municipal court, petitioner's counsel orally objected to the introduction into evidence of all articles taken during the warrantless search of the trunk. (J.A. 44-45) The court reserved counsel's objection but permitted the items to be received in evidence. (J.A. 45-46)

At the preliminary hearing the District Attorney elicited from DePue a statement that he had heard that contraband is sometimes packaged the way the two parcels were packaged. DePue, however, said he hadn't seen this himself (in all of his eight years with the Highway Patrol) and discredited this information as "merely hearsay." (J.A. 41, 83)

On March 24, 1976 petitioner's motion to suppress all tangible evidence as obtained in violation of petitioner's constitutional rights came on for hearing (based upon the

preliminary hearing transcript) and was denied. (J.A. 51-112)

Petitioner was convicted of possession of marijuana, possession for sale, and transportation of marijuana, but found not guilty of driving under the influence of a drug. Petitioner was sentenced to prison for a term of five years to life and has been released on bail pending Supreme Court review after serving a portion of this sentence.

PROCEEDINGS IN THE APPELLATE COURT AND THIS COURT

On May 9, 1978 the Court of Appeal, First Appellate District, reaching the merits of the Fourth Amendment contention, affirmed the conviction below. The court upheld the warrantless search of the luggage and sealed packages in the luggage compartment as "falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion, at iv, app.,

Petition For A Writ of Certiorari, Robbins v. State of California, No. 78-567) No other grounds were relied upon.

On June 25, 1979, this Court granted a petition for a writ of certiorari, ordered the judgment of the Court of Appeal to be vacated, and remanded the case to the Court of Appeal for further consideration in light of Arkansas v. Sanders, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 259.

On remand, the California Attorney General conceded that the warrantless searches of the tote bag and cookie tin were in violation of the Fourth Amendment.

On March 4, 1980, two members of the Court of Appeal, over the dissent of Justice Rattigan, ruled that the mandate of this Court did not require the suppression of the sealed plastic packages on the ground that "the packages did not support a reasonable expectation of privacy." (Opinion, at A-6, Petition)

On April 30, 1980, over the dissent of Chief Justice Bird and Justice Tobriner, the California Supreme Court voted to deny a petition for hearing.

SUMMARY OF ARGUMENT

Under any Fourth Amendment test the search of the plain securely wrapped and sealed packages in this case required a warrant. For over a hundred years it has been recognized that Fourth Amendment protection extend to searches of "[l]etters and sealed packages of this kind . . . . closed against inspection wherever they may be." Ex parte Jackson, 96 U.S. 727, 733. Any other result under the facts of this case would legitimize warrantless searches of packages, wherever found, of almost any size and shape wrapped in almost any common material upon no more than probable cause inferences. Nonetheless, the mistake below and the perplexing array

of lower court decisions which have attempted to deal with searches of this type point to a need for the pronouncement of the rule which clearly marks the line where a warrant is required.

The Court of Appeal's decision turned on its interpretation of the "reasonable expectation of privacy" formulation which originated in Katz v. United States, 389 U.S. 347 (1967) as well as its interpretation of dicta in footnote 13 of Arkansas v. Sanders, 442 U.S. 753 (1979), which states that "containers which by their very nature cannot support a reasonable expectation of privacy because their contents can be inferred from their outward appearance" do not receive the protection of the warrant clause.

Until these highly subjective tests are explained or limited, they threaten to eclipse the most basic Fourth Amendment principles: the principle that in the

ordinary case inferences are to be drawn by the magistrate and not the police, the principle that in the ordinary case searches of private property must be performed pursuant to a warrant, and the principle that in the ordinary case, no amount of probable cause, standing alone, is sufficient to justify a warrantless search.

Requiring an evaluation of societal norms and the intensity of personal mental states, the "reasonable expectation of privacy" test fails to draw the line at which a warrant is required. The formulation, however, was never intended to assume this role. The formulation, instead, originated from an attempt to determine whether a "search and seizure" had occurred in the novel situation presented in Katz v. United States, supra. Where it is undisputed that a search and seizure has occurred, and no exigent circumstances or other recognized exceptions to the warrant

clause apply, reference to the language of the Fourth Amendment itself provides a rule which is both inexorable and clear: a search requires a warrant.

Assuming, arguendo, that the police could and did infer that the packages in this case contained bricks of marijuana does not take the case out of the rule. If the contents of the packages were in plain view (or tantamount to being in plain view) there would be no search and the warrant requirement would be deemed waived. But if, on the other hand, the contents of the packages are totally hidden from the senses, unless an exception applies, inferences which rise no higher than probable cause must be weighed by a neutral magistrate. No amount of probable cause standing alone can justify a warrantless search.

Finally, these issues appear in this Court only now nearly two years after this

case was disposed of on the premise that the contents of the packages were neither in plain view nor tantamount to being in plain view. No such contentions were made in the California Court of Appeal prior to this Court's prior disposition. Petitioner submits this should settle that issue forever. Any other result undermines the review processes of this Court.

ARGUMENT

I

ABSENT EXIGENT CIRCUMSTANCES OR SOME OTHER RECOGNIZED EXCEPTION TO THE WARRANT CLAUSE, A SEARCH AND SEIZURE REQUIRES A WARRANT

A. The Securely Wrapped Packages

The California Court of Appeal held that two securely wrapped packages "could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment."

Justice Rattigan's dissenting opinion provides a vividly accurate description of the appearance of these packages. His description is based upon a photograph contained in the trial record which the Court of Appeal majority also rely upon:

> The package visible in the photograph is apparently wrapped or boxed in an opaque material covered by an outer wrapping of transparent, collophane-type [sic] plastic. (The photograph is not in color, and the "green" plastic cannot be seen at all.) Both wrappings are sealed on the outside with at least one strip of opaque tape. As thus wrapped and sealed, the package roughly resembles an oversized, extra-long cigar box with slightly rounded corners and edges. It bears no legend or other written indicia supporting any inference concerning its contents.
>
> The photograph thus presents to me the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes. For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocuous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an un-

> labelled carton of emergency highway flares that I bought from a store shelf and have carried in the trunk of my own automobile." (Dissenting Opinion, at A-10 and A-11, app., Petition For Writ of Certiorari)

Although the California Court of Appeal majority does not suggest that Justice Rattigan's visual description is not fully accurate, it nevertheless sees the packages with entirely different thoughts in mind:

> . . . Officer DePue described the packages as "green, wrapped plastic blocks" and testified that he had heard that contraband was commonly packaged in this way . . . the bulky tape-secured packages do not present an appearance of containing anything other than contraband. The court could reasonably conclude that the contents of the packages could have been inferred from their outward appearance, so that appellant could not have held a reasonable expectation of privacy with respect to the contents.
>
> . . . Although a variety of legally possessable objects could conceivably be wrapped in brick-shaped, plastic-wrapped packages, legally possessable objects are not <u>commonly</u> packaged in this manner . . . . Any experienced observer could have inferred from

the appearance of the packages that they contained bricks of marijuana. (Opinion, at A-4-A-6, supra)

B. Discerning The Contours Of The Court of Appeal's Decision That The Packages Could Not Support A Reasonable Expectation Of Privacy

The scope of the California Court of Appeal decision can best be understood by keeping the following facts in mind:

1. The record decisively refutes any contention that the arresting officer thought the packages were bricks of marijuana and was attracted to them. According to DePue, when he opened up the luggage compartment, he saw the packages lying side by side with the luggage items. Nevertheless, DePue's attention was not attracted to the packages until after he had removed and thoroughly searched every other item in the luggage compartment.

2. The trial court never concluded that the contents of the packages could have been inferred "from their outward appearance." This issue was never raised in the trial court. The Court of Appeal itself raised this issue for the first time after this Court's June 25, 1979 reversal of its judgment.

3. The sole basis in the record for the Court of Appeal's raising the issue on remand was Officer DePue's reply to a leading question where he indicates that he had heard that contraband (not bricks of marijuana) is normally packaged in the way that the two parcels were packaged. However, he himself discredited this information as "merely hearsay" because he had "never seen them before" in all of his eight years with the California Highway Patrol.

4. The arresting officer did not state that the hearsay information came from a

reliable source, and since he ignored the packages when he first saw them he could not have said that he relied upon the hearsay.

5. There is likewise nothing in the record to suggest that the particular wrapping employed in this case (i.e., green plastic) is the only way contraband may normally be wrapped. Indeed, in Filitti v. Superior Court, supra, the police officer testified that blocks of marijuana are often wrapped in butcher paper. 23 C.A.3d 930, 932 (1972) Likewise, in United States v. Stevie, 582 F.2d 1175 at 1179, n. 4 (1978), it was noted that burlap bags are also customarily used to ship marijuana. Counsel are likewise informed that bricks of marijuana are also often wrapped in other common wrapping materials.

6. Even assuming, arguendo, that contraband is normally packaged in plastic, butcher paper, burlap or any other common

material, this does not suggest what portion of packages using such materials contain contraband. Thus, for example, in People v. Suennen, 114 C.A.3d 192 (1980), there was hearsay evidence that burglars commonly use pillowcases, but no suggestion that most pillowcases contain stolen goods. As far as the record in this case is concerned, in view of the widespread use of plastic, butcher paper, and burlap in packaging, the amount of contraband carried in such packaging may be (and probably is) miniscule compared to the amount of legal goods. The common use of such materials for contraband may be mostly due to their universal availability, thereby providing a package indistinguishable from the millions of other parcels wrapped in the same nondescript manner.

7. There is nothing in the record to suggest that the size or shape of the parcels was in any way remarkable. A brick

of marijuana can be of any size or shape, but most commonly a brick means a kilogram (i.e., 2.2 lbs.) of marijuana. Thus, in Filitti v. Superior Court, 23 C.A.3d 930, 932, 935 (1972), the brick of marijuana weighed one kilogram and was contained within a 7" x 10" package. Since each of the parcels in this case weighed approximately fifteen pounds, this would suggest that they were seven to eight times the size of the parcel involved in Filetti v. Superior Court, supra.

8. There is also nothing in the Court of Appeal's decision to suggest that its holding regarding packages of this type is limited to automobiles. This follows from the Court's holding in Arkansas v. Sanders, that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." 442 U.S. 752, 765, n. 13; 61 L.Ed.2d 235, 245.

Thus the California Court of Appeal could be expected to reach the same result for the search of a parcel of almost any size or weight which is tightly wrapped for shipment in almost any common wrapping material.

C. How Intensely Personal Must An Expectation Of Privacy Be For A Warrant To Be Required?

There is no basis for a conclusion that the securely wrapped packages in this case did not support a reasonable expectation of privacy. Nonetheless, the California Court of Appeal's conclusion to the contrary, as well as its inference-reaching process, points out the highly subjective and unreliable nature of the "reasonable expectation of privacy" rule. As is evident from the perplexing array of lower court opinions on the subject, the test is capable of reaching any desired result.

People v. Dalton, 24 C.3d 850 (1979) (reasonable expectation of privacy in metal tool box and leather box with "Longine" inscription); People v. Musante, 102 C.A.3d 156 (reasonable expectation of privacy in electric blanket box); United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979) (reasonable expectation of privacy in plain cardboard boxes sealed with tape); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (no reasonable expectation of privacy in closed cardboard box); People v. Diaz, 101 C.A.3d 440 (1980) (no reasonable expectation of privacy in closed soft drink container or lunchbox); People v. Pace, 92 C.A.3d 199 (1979) (reasonable expectation of privacy in a lunchbox); People v. Suennen, 114 C.A.3d 192 (1980) (no reasonable expectation of privacy in personal effects carried in a pillowcase); United States v. Rivera, 486 F.Supp. 1025, 1029-1034 (1980) (reasonable expectation of

privacy in marijuana contents of large black polyethelene garbage bags which were sealed)[2]; United States v. Gooch, 603 F.2d 122, 126-127, (1979) (no reaconsble expectation of privacy in large plastic sacks since Sanders does not apply to "mere cargo"); United States v. Sanders, 631 F.2d 1309, 1321 (8th Cir. 1980) (warrant not required for search of heavy manila envelope of the type used to carry stamps, coins, watches, etc.); United States v. Honigman, 633 F.2d 1337 (1980) (no reasonable expectation of privacy where contents were inside an opaque paper bag which was itself inside a shopping bag).

This Court cannot provide order in this area of law by simply classifying the differing varieties of containers. The types of containers in which objects may be car-

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[2] Note that the packages in the instant case were not wrapped in garbage bags, as in United States v. Rivera, supra, but were wrapped in heavy duty plastic similar to a type used in commercial packaging.

ried are potentially infinite. As Justice Blackmun states:

> [S]uppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attache case, and duffel bag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? 442 U.S. at 772; 61 L.Ed.2d at 250.

The State of California accepts Justice Blackmun's characterization of the issue. According to the California Attorney General, in each case the officer in the field must ask the following question: whether the person has " an expectation of privacy in the packages in his car so intense that police [are] constitutionally required to secure a warrant before examining them?" (Opposition to Petition for Writ of Certiorari, at i).

Does such a question provide any guidance at all to the policeman in the field?

At what point on the gradient scale of "personal" does one find the mark of the warrant clause? When the expectation of privacy reaches .2 on a scale of 1? When it reaches halfway up the scale? When it reaches .95 of a scale of 1?

As Professor Amsterdam cautions, reducing the policies of the Fourth Amendment to

> . . . a general sliding scale approach could only produce more slide than scale . . . what it means in practice is that appellate courts defer to trial courts and trial courts defer to police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 393 (1974).

D. The Normal Repositories For Personal Effects Approach

It only confuses matters to suggest, as the State of California does, that the Fourth Amendment's protection of containers

be limited to those "normally . . . intended to 'serve as repositories for personal items'." (Opposition to Petition for Writ of Certiorari, at 11).

According to Webster's New World Dictionary, a repository is:

> a box, chest, closet, or room in which things may be placed for safekeeping.

By this definition, a repository would appear to be a container which is used for a more permanent type of storage and safekeeping. Arguably, luggage would not fall within this class. Boxes for storage would fall within the class but not boxes for shipment or the mails. Faced with this definition problem, the Attorney General might offer to enlarge the class to include temporary repositories for transportation.

Nonetheless, the concept of repository does not have roots in the Fourth Amendment notions of privacy. The function of

a repository is safekeeping, not privacy. A museum might be deemed a repository of art works despite the fact that the works are on public display. On the other hand, a manila folder with written material inside it might not be deemed a repository, despite the fact that it serves to protect the written material from unwanted eyes. Thus what really counts for purposes of Fourth Amendment privacy analysis is not whether a container is a repository, but whether it protects its contents from unwanted eyes.

The proposed rule also cannot define what containers are "normally intended" to serve as repositories of personal effects. What does it mean to say that a particular container is "normally intended" to serve as a storage or transportation repository for personal effects? Who is the person who is intending? What use of a particular container is "normal?" A shoe box normally

carries shoes, but can be used to carry any small personal effect. Which of these uses is normal? A pillowcase normally does not carry anything but is known to be used by the less affluent as a container to carry personal clothing and other laundry to a laundry room. Would this be deemed a normal or abnormal use? See also People v. Suennen, 114 C.A.3d 192 (1980) (pillowcases commonly used by burglars).

Personal items can be and sometimes are carried in a bag. The most common use of the paper bag or shopping bag is its use to carry grocery goods and merchandise. Sometimes such items are personal. A paper bag or shopping bag can also be and is sometimes used to carry other types of personal effects when other types of containers are unavailable. Which of these uses would be deemed normal?

Consider the situation of a man walking through a high crime area. If he carries

his personal effects in an expensive briefcase, he runs the risk of attracting unwanted attention, so he carries his personal items in a Macy's shopping bag. Is this use normal?

A fishing tackle box normally carries fishing tackle, but functions as a repository for jewelry, private papers or important documents. Are not all of these uses normal?

Thus in United States v. Rivera, 486 F.Supp. 1025 (N.D. Tex.), where the court held that there was a reasonable expectation of privacy in the contents of sealed plastic bags of the type ordinarily used for garbage, the court said:

> . . . Here, of course, we are not dealing with a usual type of luggage or duffel bag—a common repository of personal effects. But the question must answer itself. One man's garbage is another man's luggage. There may well be cases where the containers themselves fail the objective test. But when a container has the quality of preserving privacy and its use is

> not so "unusual" as to put the government on notice of a particular privacy interest, that its usage is unusual does not deny a privacy interest. That approach could take us down a path of categorizing containers. Otherwise stated, the usage is not so alien to custom that measured by objective standards, no right to privacy is reasonable. We do not have a case where there is a subjective interest so farfetched that government cannot be required to anticipate a reasonable claim of privacy. Id. at 1034.

According to Webster's New World Dictionary, "normal" means:

> conforming with or constituting an accepted standard, model, or pattern; especially, corresponding to the median or average of a large group in type, appearance, achievement, function, development, etc., natural, standard, regular.

Thus, by the primary definition the "normal repositories" rule would seem to protect only "repositories for personal effects" which conform to "accepted standards." But where are these accepted standards to be found? Morality does not govern here. People do not raise their

eyebrows at the sight of an abnormal repository of personal effects. If anything, the greatest intensity of desire for privacy inspires the most unusual repositories. Thus, people may hide their personal wealth in the ground, in a mattress, or underneath a plank in a staircase.

If it can be said that there is any community-wide standard, that standard leaves each man total freedom of choice. Thus any container which functions to keep out prying eyes would be deemed normal.

Unwilling to accept this plain truth, the State of California might urge that it has a different definition of normal in mind, an approach which would limit Fourth Amendment protection to those containers which are most common. But how would such an approach be carried out? It would seem to require a statistical survey of a large cross-section of people, asking each what type of repositories they use for their

personal effects. The most common response would be "the normal repository of personal effects."

Obviously, however, it would be absurd for the Fourth Amendment to protect only one type of repository for personal effects. It would therefore be expected that the proponent of the rule would offer to protect not only the most common type of repository, but also the most common types of repositories.

But how common must a repository be to fall within the proposed rule? Would only the top five repositories be protected? Or on the the top ten? The top forty? Who would decide these questions?

In any case, what constitutional foundation do such distinctions have? Is it to be argued that the Fourth Amendment frowns upon the man who chooses an unusual repository for his personal effects? Is it to be argued that the man who can afford an

expensive set of luggage receives greater Fourth Amendment protection than the man who transports his personal effects in a less privileged but no less private fashion?

E. In Katz v. United States, The Reasonable Expectation Of Privacy Analysis Simply Established That A Search And Seizure Had Occurred

This is not to deny the fundamental truth of the "reasonable expectation of privacy" formulation in Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347 (1967). The term now seems to have been adopted by this Court despite the fact that it was not used in the opinion for the court in Katz. See Smith v. Maryland, 442 U.S. 735 (1979). Justice Harlan's formulation of ultimate Fourth Amendment principle still remains so clear that it can neither be proved nor contradicted unless by a proposition still clearer. Nonetheless, the term was not offered by Justice Harlan as a ru-

bric for policemen in the field.

The issue in Katz v. United States, supra, was whether or not electronic surveillance of a phone booth was a "search and seizure" within the meaning of the Fourth Amendment. If there was a search and seizure, a warrant would be required. If there was no search and seizure, no warrant would be required.

The question was novel since electronic eavesdropping involved no physical penetration of the phone booth, thus no search and seizure in the traditional sense of Goldman v. United States, 316 U.S. 129, which said that a trespass was required. The Court was therefore called upon to consider what ultimate Fourth Amendment principle stood behind the warrant clause.

The Court declared that a person in a telephone booth may rely upon the protection of the Fourth Amendment as to matters he reasonably seeks to preserve as private:

> . . . [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> . . . No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. Id. at 352 [Citations omitted].

The Court therefore held that the electronic eavesdropping constituted a "search and seizure":

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and Seizure" within the meaning of the Fourth Amendment. Id. at 353.

Justice Harlan's concurring opinion no more than attempts to explain the opinion of the court. He notes that:

> Silverman v. United States . . . established that interception of

> conversations intended to be private could constitute a "search and seizure," and that the examination or taking of physical property was not required . . . In Silverman we found it unnecessary to reexamine Goldman v. United States, which had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment. This case requires us to reconsider Goldman, and I agree it should now be overruled. Its limit on the Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion. 389 U.S. at 361-62.

Smith v. Maryland, 442 U.S. 735 (1979) also follows Katz v. United States, supra. In that case this Court held that a telephone pen register did not involve a "search and seizure" since there was no violation of a reasonable expectation of privacy.

In this case, by contrast, it is undisputed that there was both a seizure and a search. The seizure occurred when the

packages were taken from the luggage compartment. The search occurred when the securely wrapped packages were untaped, unwrapped, and opened. Since that case does not fall within any of the narrow exceptions to the warrant clause, a warrant was required.

F. Absent Exigent Circumstances Or Some Other Warrant Clause Exception, A Search And Seizure Requires A Warrant

The fact that the reasonable expectation of privacy principle stands behind the Fourth Amendment as an ultimate constitutional fountainhead does not necessarily mean that it can serve as a yardstick to be daily used by the policeman in the field. This Court looks to ultimate principle to understand rules and fashion new ones. But such principles are not necessarily rules themselves. This Court does not simply tell its Clerk of the Court to grant due process to all petitioners. The Court in-

stead looks to due process and fashions rules which accord with its principle. In the same way, the "reasonable expectation of privacy" principle is not a rule for the policeman in the field. The principle offers inspiration and is food for thought, but itself draws no clear lines.

Turning this truth into a rubric would do much more harm than good. If convictions are to be upheld under the exclusionary rule the police need Fourth Amendment rules which are starkly clear and draw razor sharp lines. No guidance is offered by a rule which requires an evaluation of societal norms and an estimate of the intensity of personal mental states. Such a rule fails to offer any advice at all on the ultimate question: the point at which the warrant is required.

As Katz v. United States, supra, and Smith v. Maryland, supra, implicitly declare, the Fourth Amendment itself draws

this line. Governmental intrusions which constitute "searches and seizures" call into play the Fourth Amendment. Absent exigent circumstances or some other recognized exception to the warrant clause, a search requires a warrant.

The "reasonable expectation of privacy" analysis itself reaches this result. "That expectation is, simply put, what citizens may properly expect of government." United States v. Rivera, 486 F.Supp. 1025, 1030 (N.D. Tex. 1980). As the Rivera court said of the "test":

> While the court confesses difficulty in applying this "test," it appears that the inquiry is actually whether there is a right to be free of government intrusion without a warrant when articles have been so placed. Id. at 1034.

As this Court held in United States v. Chadwick, for over a hundred years it has been recognized that the Fourth Amendment guarantees extend to

> [l]etters and sealed packages . . . closed against inspection

wherever they may be. Ex parte Jackson, 96 U.S. 727, 733 (1878); United States v. Chadwick, 433 U.S. 1, 10.

II

"NO AMOUNT OF PROBABLE CAUSE CAN JUSTIFY A WARRANTLESS SEARCH OR SEIZURE ABSENT 'EXIGENT CIRCUMSTANCES.'" COOLIDGE v. NEW HAMPSHIRE

The essence of the opinion below is that the particular packages opened by the police without a warrant strongly suggested to an experienced observer by their appearance that they contained bricks of marijuana. The majority below was of the opinion that since "legally possessable objects are not commonly packaged in this manner" the packages were not entitled to "a reasonable expectation of privacy" and thus were not protected by the Fourth Amendment.

As petitioner has earlier noted, the record does not contain factual support for the Court of Appeal's conclusions. Supra,

at pp. 16-19. Officer DePue ignored the packages when he first saw them and never said he thought they contained bricks of marijuana.

Even assuming arguendo that Officer DePue had inferred from the appearance of the packages that they might contain marijuana, however, would not justify a warrantless search. The California Court of Appeal's contrary conclusion confuses the issue of whether there was a Fourth Amendment "search" with the probable cause standard for a search.

Reference to the "reasonable expectation of privacy" principle articulated in Katz v. United States, 389 U.S. 347 (1967) or the "legitimate expectation of privacy" principle used by this Court in United States v. Chadwick, 433 U.S. 1 (1977) may assist a determination of whether a Fourth Amendment "search and seizure" has occurred. But whatever the formulation, it certainly

must be conceded that under the prior decisions of this Court, no matter how much probable cause there is that a particular container contains contraband, the requirement of a judicial warrant before the police open a sealed container is still applicable. As this Court said in Coolidge v. New Hampshire, 403 U.S. 443 (1971):

> [N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Id. at 468.

This rule even applies when contraband inside premises is plainly seen by police who are outside:

> Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rules that the police may not enter a make a warrantless search. Id. at 468.

These same rules apply to searches of packages legally seized. Thus in Arkansas v. Sanders, supra, the police had reliable

information that checked out perfectly that a particular suitcase of a described color contained marijuana. In United States v. Chadwick, supra, the footlocker was leaking talcum powder, a substance often used to mask the odor of marijuana, and a trained dog signaled the presence of a controlled substance inside. Nevertheless, warrants were required for both of these searches because of the constitutional preference for warrants absent exigent circumstances. Justice Powell, writing for the court in Arkansas v. Sanders, supra, stated:

> The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.
> 442 U.S. 753, 758, 61 L.Ed.2d 235, 241.

Justice Powell also pointed out that our nation has made a basic constitutional choice that individual freedoms are best protected through a separation of govern-

mental powers among the different branches and levels of government so that, in the case of searches of a person's papers, houses and effects, it is the executive branch which will perform the search but it must normally be authorized by the judicial branch, namely a neutral and detached magistrate not engaged in the often competetive enterprise of ferreting out crime. Id.

The California Court of Appeal claims that its contrary view is supported by dicta in a footnote to this Court's opinion in Arkansas v. Sanders, supra. We quote that footnote now:

> Not all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a

> warrant. See Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968) (per curium). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile. 442 U.S. at 764-765, n. 13.

Relying upon this footnote, two members of the California Court of Appeal held that a warrantless search was permissible since the contents of the packages allegedly could be inferred from their outward appearances.

The Court of Appeal's reading of this footnote is totally unjustified. The footnote describes two classes of containers, but neither of these classes has even remote application to the securely wrapped packages in this case.

A. Containers The Contents Of Which Are In Plain View

When the contents of a seized container are in "plain view" there is no reasonable expectation of privacy and thus no search occurs. See Harris v. United States, 390 U.S. 234, 236 (1968). But the plain view of packages and the strong belief that they contain evidence of a crime or contraband do not authorize a warrantless, general exploratory search. United States v. Chadwick, 443 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Turk, 526 F.2d 654 (5th Cir. 1976); United States v. Hunt, 366 F.Supp. 172 (N.D. Tex 1973). See also Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971); Taylor v. United States, 286 U.S. 1 (1932); Steele v. United States, 267 U.S. 498 (1925); Moylan, The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L.Rev. 1047 (1975); LaFave, A Treatise on the Fourth Amendment, Vol. 2,

§§ 7.5(b) and (d). Thus the plain view exception does not apply to this case.

B. Containers Which By Their Very Nature Cannot Support Any Reasonable Expectation of Privacy

The other class of containers mentioned in footnote 13 are "containers (which) . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Note that this is a two-fold requirement:

1. the container must be of the type which by its very nature cannot support any reasonable expectation of privacy;
2. the contents can be inferred from the outward appearance of the container.

The footnote in Sanders does not clearly specify how much room for doubt the inference process can leave. Presumably, how-

ever, since the Court is describing a container which "by [its] very nature cannot support any reasonable expectation of privacy," the Court has in mind a situation where the contents are tantamount to being in plain view. Where, on the other hand, the nature of a package simply permits suspicions and inferences rising no higher than probable cause, "[t]he point of the Fourth Amendment . . . is . . . that those inferences are to be drawn by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 13-14 (1948). No amount of probable cause standing alone can justify a warrantless seizure. Coolidge v. New Hampshire, 403 U.S. 443, 468.

Footnote 13 in Arkansas v. Sanders gives examples, "a kit of burglar tools or a gun case."[3] Added to this list might be a li-

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[3] The Court's footnote examples have created some confusion in the lower courts and need clarification. As to self-identifying containers such as a gun case, it could well be said that a warrantless

quor bottle or a beer can in a car or a public place, boxes containing legends on their wrappers stating "live machine gun ammunition" or "fireworks" (where their possession is illegal) and boxes identifying the contents as restricted drugs. These may be called "self-identifying" containers. As to such containers, it could well be said that one who chooses to carry material he wants private in such a container has waived his right to privacy by a container which, under certain circumstances, provides so open an invitation to police inspection.

The securely wrapped packages in this case do not qualify as self-identifying.

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3 (cont.)

search would be authorized under the exigent circumstances. As to the kit of burglar tools, we must agree with Professor LaFave who states:

> It is less than apparent, however, that the fact a kit contains burglar tools can often "be inferred" from its "outside appearance." LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 1980, Vol. 2, p. 39, n. 102.2.

They are much more like the containers in Arkansas v. Sanders and United States v. Chadwick than they are containers whose contents are graphically disclosed by outer appearances. The contents were not tantamount to being in plain view. There was no waiver of a Fourth Amendment right. On the contrary, the State of California concedes that petition had an expectation of privacy in the packages. (Opposition to Petition for Writ of Certiorari, at 10)

As to the "nature" of the container employed, we deal with a package which "presents the visual impression of a package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes." (Opinion of Justice Rattigan, Petition for Writ of Certiorari, p. A-11). The package bore no legend or other written indicia supporting any inferences regarding its contents. The "nature" of the package was no different than the

nature of any other plainly wrapped, rectangular-shaped package routinely shipped by mail. The nature of the package was such that the contents could not be known while the package remained tightly wrapped and sealed closed.

Any estimate as to what is in a package of this type is no more than a hunch. Officer DePue did not make such a guess, but even assuming he could or did, the policy of the warrant clause is "that those inferences be drawn by a neutral and detached magistrate." Johnson v. United States, 333 U.S. 10, 13-14.

C. One Who Safeguards His Personal Possessions Is Due The Protection Of The Fourth Amendment

These conclusions are confirmed by the history of decisions of this Court which have extended the Fourth Amendment guarantee to whosoever securely safeguards his personal possessions. Certainly petitioner

protected the privacy of his possessions far more adequately than the leaking footlocker shipped by train in United States v. Chadwick, supra. As to the facts in that case, the court declared:

> No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment. 433 U.S. 1, at 11.

A securely wrapped package is the standard measure of the right of our people to be secure against unreasonable searches and seizures of their papers and effects. United States v. Chadwick, supra, quotes the following from the venerable precedent of Ex parte Jackson, 96 U.S. 727, 733:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and an inspection, except as to their outward form and weight as if they were retained by the parties. The constitutional guarantee of the right of the People to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed

> against inspection wherever they may be. U.S. v. Chadwick, 433 U.S. at 10.

Sealed packages were again accorded the full protection of the warrant clause of the Fourth Amendment in United States v. van Leeuwen, 397 U.S. 249 (1970). See also United States v. Phillips, 478 F.2d 743 (5th Cir. 1973).

Certainly the sealed packages in this case could not be included in the category of containers which "by their very nature cannot support any reasonable expectation of privacy" without doing violence to the principles of Jackson and van Leeuwen. Indeed, the holding of Ex parte Jackson merely extends to the mails the rights of privacy which would exist if the letters and sealed packages "were retained by the parties." 96 U.S. at 733.

The holding of Arkansas v. Sanders makes it clear that finding luggage or packages in automobiles is not different than find-

ing them any other place. Thus, if the police had been invited into petitioner's home for the purpose of discussing with him the purchase of raffle tickets and while there viewed securely wrapped and sealed plain packages which could have contained bricks of marijuana, they would have had no right to seize and search those packages without a warrant absent emergency conditions.

D. Exceptions To The Warrant Clause Must Be Few And Rigorously Circumscribed

The search of the packages in this case required a warrant unless the Court is willing to create some new exception to the warrant clause. Exceptions can be established to the warrant requirement since the public interest requires some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search. A number of well established

principles control the recognition of such exceptions.

1. These exceptions are "few" and "jealously and carefully drawn." Jones v. United States, 357 U.S. 493, 499 (1958).

2. Exceptions are allowed in those cases where the societal costs of obtaining a warrant such as danger to law officers or the risk of loss or destruction of evidence outweigh the reasons for prior recourse to a neutral magistrate. United States v. United States District Court, 407 U.S. 297, 318 (1972).

3. Since every exception impinges to some extent upon the protective purpose of the Fourth Amendment, "the burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1952).

4. The reach of each exception will be limited to that which is necessary to accomodate the identified needs of society.

Mincie v. Arizona, 437 U.S. 385, 393 (1978).

The search in this case cannot satisfy these standards. There are no identified needs of siciety comparable to the needs posed by the risk of guns or the risk of destruction of evidence which require the suspension of the warrant clause for parcels of almost any size or weight which are shipped in almost any common wrapping material. Arkansas v. Sanders, 442 U.S. 753. On the contrary, parcels of this type are the traditional business of the warrant clause. Ex parte Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970).

III

THE MANDATE OF THIS COURT WAS VIOLATED WHEN THE STATE COURT REINSTATED ITS JUDGMENT ON NEW GROUNDS NOT ENCOMPASSED WITHIN ITS PRIOR JUDGMENT

The May 9, 1978 decision of the California Court of Appeal upheld the warrantless search on one ground only, "as falling within the exception authorizing warrantless searches of automobiles and their contents where there is probable cause." (Opinion at iv, App. to Petition For A Writ of Certiorari, Robbins v. State of California, No. 78-567). The State of California had not contended in that court, or prior thereto, that the contents of the packages were in plain view or could be inferred from the outward appearance of the packages.

Inasmuch as neither the State of California nor the California Court of Appeal had raised this issue, petitioner did not raise this issue in his Petition for Writ of Certiorari to this Court dated September 29, 1978. On June 25, 1979 this Court granted

the Petition, ordered the judgment of the Court of Appeal be vacated and remanded the case to the Court of Appeal for further consideration in light of Arkansas v. Sanders, supra.

Had the new grounds now urged been previously raised or decided upon, petitioner might have filed a different petition to this Court, the review by this Court might have been different, a different mandate might have been issued, or no mandate at all might have issued.

But this was not the case. The review of this Court was directed to a decision of the California Court of Appeal which did not encompass a claim that the contents of the packages were in plain view or could be inferred from the outer appearance of the package. Petitioner submits that this should settle that issue forever. Any other result undermines the authority of this Court to finally settle federal questions.

The California Court of Appeal could not consider the new grounds simply because these grounds were mentioned in footnote 13 of Arkansas v. Sanders. In its efforts to provide a comprehensive and scholarly map of the Fourth Amendment, Arkansas v. Sanders discusses all the exceptions to the warrant clause, including the exigent circumstances exception and the search incident to arrest exception. 442 U.S. at 759, 760, 763, n. 11. Neither the grounds mentioned in footnote 13 nor any of the other exceptions to the warrant clause were encompassed within the prior decision of the California Court of Appeal. The California Court of Appeal could no more reinstate its judgment on the basis of footnote 13 than it could reinstate its judgment on any other new ground. To hold otherwise would permit the Court of Appeal upon a second reversal and remand to reinstate its judgment on some further new

ground not presently encompassed in their most recent decision.

In N.A.A.C.P. v. Alabama, 360 U.S. 240 (1959), where an Alabama court had adjudged the N.A.A.C.P. in contempt for failure to disclose its membership list, this Court dealt with this type of problem. In the Court's original opinion it decided the issue raised by the briefs and the record, i.e., "whether the refusal of the N.A.A.C.P. to produce names and addresses of its Alabama members was protected by the Fourteenth Amendment's interdiction against state interference with First Amendment rights?" Id. at 243, n. 3. No claim had been made by the State of Alabama, or decided upon by the Alabama Supreme Court that the contempt order was founded upon any other ground except the failure to disclose membership lists. "And that was the premise on which the Court disposed of the case." 360 U.S. at 243.

Nonetheless, after the Court remanded the case to the Alabama Supreme Court, that court reinstated its decision on new grounds, to wit: that the N.A.A.C.P. had been adjudged in the contempt for failing to produce other documents aside from the membership lists.

This Court held that the Alabama Supreme Court could not ignore the premises upon which this Court's decision rested. Quoting from Sibbold v. United States, 12 Pet. 488, 492, this Court held:

> Whatever was before the Court, and is disposed of, is considered finally settled. N.A.A.C.P. v. Alabama, 360 U.S. at 244-245.

Under Art. II of the Constitution, this Court's jurisdiction is limited to actual "cases and controversies." A decision of remand which nullifies this Court's decision on new grounds has the net effect of holding that there was no real case or controversy in this Court.

Admittedly, lower courts have sometimes succeeded in evading the mandate of this Court by reinstating their decision on new state grounds. See, e.g., Davis v. Packwood, 8 Pet. 312 (1834); Note, 55 Harv.L. Rev. 1357 (1942); Note, 67 Harv.L.Rev. 1251 (1954); Note, 95 U.Pa.L.Rev. 764 (1947); Note, 56 Yale L.J. 574, 580 (1947); Note, 50 Geo.L.J. 819. This is because the traditional function of this Court in review of state court decisions is to decide the federal issues and then send the case back to the state court to render final judgment. See, e.g., Murdock v. Memphis, 20 Wall. 590, 636 (1875); see generally, Note, 55 Harv. L.Rev. 1357 (1942).

Some believe that when this policy of judicial restraint permits evasion of this Court's mandate, our country's judicial system is discredited. See, e.g., 56 Yale L.J. 574, 580 (1947). Nonetheless, it is recognized that the policy applies only to new

state grounds, and does not permit a state court to evade this Court's mandate by re-instating its judgment on new federal grounds which were not previously raised or considered. See generally, Note, 67 Harv.L.Rev. 1251, 1257 (1954); Note, 50 Geo.L.J. 819, 848 at n. 213.

Mandates of the type involved in this case account for a substantial portion of this Court's workload. To the extent possible the decisions and rules of this Court should articulate the scope of such a mandate. As Roger Traynor, the former Chief Justice of the California Supreme Court has stated:

> In its pre-occupation with substantive problems an appellate court sometimes loses sight of the importance of the procedural rules for determining what errors will be reviewed and how a case will be disposed of if the judgment below proves erroneous. Certainly the court's rules should enable it to settle as much of the dispute as possible on one appeal.
> Some Open Questions on the Work of State Appellate Courts, 24 U.Chi.L.Rev. 221-222 (1957)

This policy assumes special importance for appeals in criminal cases where justice should be both swift and sure, and public outcries are heard that multiple appeals on procedural grounds tax the ability of the system to function properly. It is therefore fortunate that even though it may not be possible for this Court to articulate a rule which applies to all types of civil and criminal cases, it is possible to recognize a rule which applies to procedural objections in search and seizure cases. When objections are made to a search, there exists a discrete number of federal grounds for objections and a discrete number of federal grounds for supporting the search and seizure. Thus, for example, where a warrantless search has occurred, only a few exceptions to the warrant clause are recognized. There is absolutely no reason why all objections by the defendant and defenses by the state cannot be raised prior to the

time for the filing of the petition for writ of certiorari in this Court.

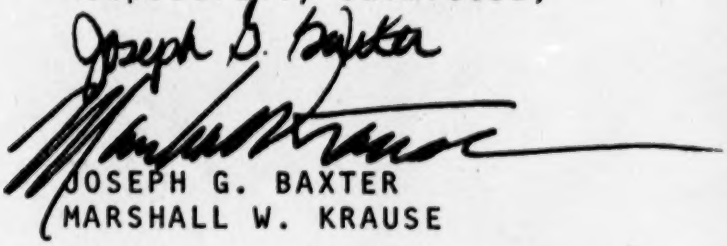
Petitioner submits that unless the mandate of this Court on remand specifically authorizes the state court to consider new federal grounds, see, e.g., McGoldrick v. Berwind-White Co., 309 U.S. 33, 59 (1940), federal grounds not previously raised may not be used to reinstate a state court judgment reversed by this Court on a search and seizure issue. Such a rule applies equally to the prosecution and the defense. Any other rule permits a state court to make the review process of this Court a waste of time for both the Court and the petitioner. Any other rule permits state courts to unseat the authority of this Court to finally settle federal questions.

CONCLUSION

For all the reasons mentioned, petitioner respectfully requests that the judgment of the California Court of Appeal be vacated and reversed.

Dated: March 5, 1981

Respectfully submitted,



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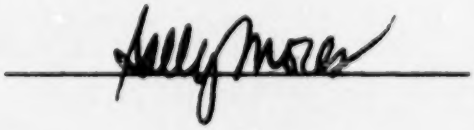
PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, in which county the within mentioned mailing occurred, and not a party to the subject cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On March 12, 1981 I served the within Brief for Petitioner on the respondent to said action by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Larkspur, California, addressed as follows:

Attorney General of the State of California
Department of Justice
6000 State Building
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 12, 1981, at Larkspur, California.



No. 80-148

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Did petitioner have an expectation of privacy in the containers in his car so intense that police were constitutionally required to secure a warrant before examining them?

2. Should the exclusionary rule be invoked to suppress evidence seized in reasonable reliance on state and federal decisions antedating United States v. Chadwick, 433 U.S. 1 (1977)?

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No. 80-148

IN THE SUPREME COURT

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UNITED STATES

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Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
FIRST APPELLATE DISTRICT

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on March 4, 1980, is appended to the Petition for Writ of Certiorari and may

/

/

be found at 103 Cal.App.3d 34, 162 Cal.Rptr. 780.[1/]

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Code sections 1257 and 2101. Jurisdiction is

---

1. The court of appeal filed two earlier opinions, both unpublished, in this case. The first, filed on June 30, 1976, was vacated by that court's order of July 22, 1977. Petitioner's appeal was reinstated for further briefing and oral argument. Prior to its vacation, petitioner had sought review of this first opinion by petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). Following a response by the State of California, this Court denied the petition.

After reinstatement of the appeal, the court of appeal filed a second opinion on May 9, 1978, and amended it on May 22, 1978. After denial of a hearing by the California Supreme Court on July 5, 1978, petitioner sought review in this Court by petition for writ of certiorari filed on October 3, 1978 (No. 78-567). On June 25, 1979, this Court granted the writ, vacated the decision of the court of appeal, and remanded the cause for reconsideration in light of Arkansas v. Sanders, 442 U.S. 753 (1979). 443 U.S. 903.

conferred by Title 28, United States Code, section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

STATEMENT OF THE CASE

On January 23, 1975, the District Attorney of Solano County accused petitioner Jeffrey Richard Robbins of possession, possession for sale, and transportation of marijuana, in violation of California Health and Safety Code sections 11357, 11359, and 11360; and driving under the influence of a drug, in violation of Vehicle Code section 23105 (CT 8-9).[2/] Petitioner pleaded not guilty (CT 11), was tried by

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2. "CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the suppression hearing; "RT" refers to the Reporter's Transcript of trial proceedings; "PHT" refers to the Transcript of the preliminary hearing; "JA" refers to the Joint Appendix.

a jury (CT 13), and on May 1, 1975, was convicted of possession, possession for sale, and transportation of marijuana, but was acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 in Solano County at 1:45 a.m. on January 5, 1975, California Highway Patrol Officers Ronald DePue and Richard Stoltz noticed petitioner Jeffrey Richard Robbins driving in the same direction in a blue, 1966 Chevrolet four-door station wagon along parallel Nelson Road (RTS 4-5; PHT 6; JA 6, 55-56). As the officers observed petitioner at a distance of about one tenth of a mile, Robbins twice crossed the centerline of the roadway (RTS 6; JA 58). Approaching a curve, petitioner's station wagon drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line

(RTS 6; JA 58). Petitioner managed to return his vehicle to the right side of the road but, while negotiating the curve, drifted three feet across the center line (RTS 6-7; JA 58-59). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 mile-per-hour zone (RTS 6; JA 57). Judging petitioner's driving to be erratic, Officer DePue and Sergeant Stoltz followed and stopped him "to determine why it had left -- was operating outside of a marked road lane" (RTS 7; JA 60).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8; PA 61). The officer asked for petitioner's driver's license and ownership registration (RTS 9; JA 62).[3/] Petitioner, perspiring

---

3. California Vehicle Code section 4454 requires owners to maintain the
(Footnote continued next page)

profusely, swallowing rapidly, his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (PHT 5, 17; JA 9, 29). When petitioner opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (PHT 6-7; RTS 9-10; JA 10-11, 64-65). The officer also noted smoke in the station wagon's interior (RT 43).

(Footnote continued from previous page)

registration or a facsimile copy in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

Officer DePue then pat-searched petitioner for weapons (RTS 10; JA 65), finding only a vial of malodorous liquid (RTS 11; JA 65-66). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RTS 12; JA 67). The officer previously had observed such devices used to hold marijuana roaches (RT 43). After petitioner vomited (RTS 12; JA 68), DePue reentered the station wagon to find two pairs of tweezers on the dashboard, one with a burned, hand-rolled cigarette butt, and a cookie tin on the rear floor (PHT 7; RTS 14-16; JA 12-13, 70-75). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (PHT 8; RTS 18; JA 13, 77).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz, "What you

are looking for is in the back" (RTS 18, 25; JA 77, 89). Stoltz relayed this statement to DePue, who then unlocked the back of the station wagon, raised the floorboard, and found a brown tote bag, a briefcase, and two green plastic bags which had been taped closed (PHT 23-24; JA 39-40).

It was stipulated that the green bags each contained 15.25 pounds of marijuana (PHT 25; JA 42). It was further stipulated that three plastic bags in the tote bag contained, respectively, 474.2 grams, 445.3 grams, and 475.3 grams of marijuana. A pint glass jar also found in the tote bag contained 54.7 grams of marijuana. The cookie tin contained 12.7 grams of marijuana seeds and 3.8 grams of marijuana (PHT 25; JA 42-43). Inspector Grundy of the Solano County Drug Abuse Bureau placed the street value of the seized contraband at

approximately $8,000 (RT), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered, petitioner was advised of his Miranda rights (RTS 21; JA 82). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue that he did not wish "to take the fall for this" (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Petitioner said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

SUMMARY OF ARGUMENT

On January 5, 1975, two and one-half years before United States v. Chadwick, 433 U.S. 1 (1977) was decided and four and one-half years before Arkanss v. Sanders, 442 U.S. 753

(1979), was announced, a California Highway Patrol officer seized and searched petitioner's car and containers found therein with probable cause to believe that the vehicle and receptacles contained marijuana. The decisions of the California Supreme Court and Courts of Appeal, and the Courts of Appeals for several federal circuits had squarely held that the search of containers found in a car under those circumstances was reasonable. The search in this case was conducted in reasonable reliance upon those decisions.

Petitioner argues that, notwithstanding those decisions, the evidence seized as a result of the search of his belongings should have been excluded by the trial court. Respondent submits that where, as here, a search is conducted in accordance with existing

constitutional norms, the exclusionary rule should not be invoked to suppress reliable evidence, free the guilty and punish society. The purpose of the rule is to deter police misconduct. When the conduct of the officer was lawful at the time, it would be irrational to suppress evidence as a result of an unforeseeable intervening change in the law. Chadwick could not have been anticipated and should not be applied to invalidate a search which was lawful at the time it was made.

Turning to the search, petitioner argues that all warrantless searches are per se unreasonable, subject only to a few carefully delineated exceptions. This Court has held that luggage taken from an automobile may not be searched without a warrant in the absence of exigent circumstances. To permit a predictable application of the

Fourth Amendment, petitioner asserts that "luggage" must include all containers which are intended to protect their contents from observation by the outside world. Therefore, the containers -- cookie tin, tote bag, and plastic bags -- should not have been searched without a warrant.

Respondent replies that not all containers found in vehicles deserve the protection of the warrant clause of the Fourth Amendment. This Court's cases explain that the reasonable expectations of privacy attending the place to be searched or the thing to be seized determines whether a warrant -- or even probable cause -- is required. Those expectations are determined not by subjective personal desires but by objective societal norms. The crucial issue is whether the search would violate society's sense of security, engendered

and shaped by the customs and values of the past and present.

Respondent submits that the Court's cases, most notably United States v. Chadwick, 433 U.S.1 (1977); and Arkansas v. Sanders, 442 U.S.753 (1979), teach that the containers deserving the protection of the warrant requirement are those which reasonably indicate to an objective observer that they were intended to house papers or personal effects, construing that phrase to mean wearing apparel and other articles intimately associated with the human body. To determine whether the container is intended to be a repository for papers and effects, the searching police officer must consider all of the circumstances, including the nature of the container, the manner in which it is secured, the place where it is found,

and the results of any lawful sensory perception.

Applying these criteria to the cookie tin and plastic bags, we assert that there was probable cause to believe that they contained marijuana and no reason to believe that they contained anything else. Accordingly, their search by Officer DePue was valid.

ARGUMENT

I

PETITIONER'S EXPECTATION OF PRIVACY IN THE CONTAINERS SEARCHED WAS NOT SO INTENSE THAT A SEARCH WARRANT WAS REQUIRED.

Petitioner argues: (1) warrantless searches are unreasonable per se, subject only to a few specifically established and well-delineated exceptions; (2) absent consent or exigent circumstances, luggage taken from a vcehicle may not be searched without a

warrant; (3) for purposes of the warrant requirement, "luggage" must be construed to include all containers whose contents their owner has attempted to shield from the outside world; (4) in this case, petitioner attempted to conceal the contents of the cookie tin, tote bag, and taped plastic bags; (5) as he did not consent to their search and as Highway Patrol Officers could have taken them to headquarters while seeking a warrant, the warrantless search was unlawful; (6) therefore, the evidence seized should have been suppressed. For the reasons which follow, respondent submits that the search conducted on Highway 80 in the early morning of January 5, 1975, was proper and that California courts did not err in admitting the evidence and, ultimately, affirming petitioner's convictions.

A. THE WARRANT REQUIREMENT

Apparently begining with dictum in Carroll v. United States, 267 U.S. 132, 156 (1925), this Court has remained faithful to the proposition that a warrant is necessary to conduct a search unless some well-defined exception excused the procurement of prior judicial authorization[4/]. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Michigan v. Tyler, 436 U.S. 499, 504-505, 509 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Schneckloth v. Bustamonte, 412 U.S. 218,

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4. The importance and relevance of this rule regarding the search of homes was emphasized shortly after Carroll in Agnello v. United States, 269 U.S. 20, 32 (1925): "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein." The primacy of the home is still recognized in this Court's recent cases. See Payton v. New York, 445 U.S. 573, 585 (1980); United States v. United States District Court, 407 U.S. 297, 323 (1972).

219 (1973); United States v. United States District Court, 407 U.S. 297, 316-318 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 455-481 (1971) (plurality opinion).[5] We do not ask this Court to retreat from this salutary principle, which is part of the bedrock of our free society. However, to determine the reasonableness of the search which occurred in this case, it is necessary to consider some of the exceptions to the warrant requirement and

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5. Accord, Vale v. Louisiana, 399 U.S. 30, 34-35 (1971); Chimel v. California, 395 U.S. 752, 762 (1969); Mancusi v. DeForte, 392 U.S. 364, 370-371 (1968); Katz v. United States, 389 U.S. 347, 357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Stoner v. California, 376 U.S. 483, 486 (1964); Chapman v. United States, 365 U.S. 610, 613 (1961); Jones v. United States, 357 U.S. 493, 497, 499 (1958); United States v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. United States, 335 U.S. 451, 454 (1948); Trupiano v. United States, 334 U.S. 699, 705 (1948); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

their legal and theoretical justifications.

It has been axiomatic that the warrant requirement is excused if exigent circumstances require an immediate search or seizure. E.g., Warden v. Hayden, 387 U.S. 294, 298-300 (1967). However, many of the exceptions to the search warrant requirement cannot be explained upon that basis. The automobile search doctrine is a good example. When police stop a car on the street or highway because they have probable cause to believe that it contains contraband or evidence of a crime, they may search it without a warrant. Colorado v. Bannister, ___ U.S. ___, 101 S.Ct. 42 (1980); Arkansas v. Sanders, 442 U.S. 753, 760 (1979); Texas v. White, 423 U.S. 67, 68 (1975); Chambers v. Maroney, 399 U.S. 42, 47-49 (1970); Carroll v. United States, 267 U.S. 132, 153 (1925).

The search may be conducted on the spot (Carroll v. United States, supra; Colorado v. Bannister, supra), or at the police station garage. Texas v. White, supra; Chambers v. Maroney, supra; cf. Cady v. Dombrowski, 413 U.S. 433, 439-449 (1973); Cooper v. California, 386 U.S. 58 (1967).

Although some cases have suggested that the warrantless search is necessitated by the exigent circumstances occasioned by the car's mobility (Arkansas v. Sanders, supra, 442 U.S. at 761; Chambers v. Maroney, supra, 399 U.S. at 49-50), that rationale makes the station house search cases inexplicable despite attempts to reconcile them with the warrantless search exception. Arkansas v. Sanders, supra, 442 U.S. at 765 n.14; Note, Warrantless Searches and Seizures of Automobiles, 87 Harv.L.Rev.835, 843-845 (1974). Noting that "warrantless

searches of vehicles [have been upheld] in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if nonexistent" (Cady v. Dombrowski, supra, 413 U.S. at 441-442), this Court has concluded that a warrantless search is justified by the diminished expectation of privacy which surrounds the automobile: "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion); United States v. Chadwick, supra, 443 U.S. at 12. "Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their exteriors are highly visible; and they

are subject to extensive regulation and inspection." Rakas v. Illinois, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). See also South Dakota v. Opperman, 428 U.S. 364, 367-368 (1976).

A second example is the administrative search. Generally, searches of businesses for safety violations and homes for unsanitary conditions require the issuance of search warrants. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967). However, an exception from the search warrant requirement has been recognized for "pervasively regulated business[es]" (United States v. Biswell, 406 U.S. 311, 316 (1972) [firearms]), and for "closely regulated" industries "long subject to close supervision and inspection." Colonnade Catering Corp. v. United States, 397

U.S. 72, 74, 77 (1970) (liquor). Although it was pointed out in Biswell that it would be "inconvenient" to seek a warrant (406 U.S. at 316), the same is true of any unannounced or frequent inspection procedure. The crux of the exception to the warrant requirement is that the inspections "pose only limited threats to the [gun] dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." Id. at 316; see also Marshall v. Barlow's Inc., supra, 436 U.S. at 313.

Third, the "open fields" doctrine permits police to enter property not falling within the curtilege and to seize items of evidentiary value without a warrant or evidence of exigent circumstances. Hester v. United States, 265 U.S. 57 (1924). Hester, which has survived the rejection by Katz v. United States, 389 U.S. 347 (1967),[6] of the doctrine of "constitutionally protected areas" (id. at 351; see Rakas v. Illinois, 439 U.S. supra, at 144 n.12. [1979]), "is now viewed as merely an application of the principle that Fourth Amendment protections do not apply where no reasonable expectation of privacy exists." People v. McClaugherty,

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6. The formulation of the so-called Katz rule actually is found in the concurring opinion of Mr. Justice Harlan: "My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first

(Footnote continued next page)

193 Colo.360, 566 P.2d 361, 363 (1977); accord, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir.1976), cert. den. 430 U.S. 966 (1977).

It is important to realize, however, that a seizure in the Fourth Amendment sense has occurred in the foregoing situation. The inescapable conclusion is that a search or seizure is reasonable if the person who is searched has no reasonable expectation that he will be free from intrusions.[7/]

(Footnote continued from previous page)

that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, supra, 389 U.S. at 361. This Court has adopted Justice Harlan's formulation in subsequent decisions. See Smith v. Maryland, 442 U.S. 735, 739-740 (1979).

7. Similarly, the "plain view" exception to the warrant requirement (Coolidge v. New Hampshire, 403 U.S.443 465-468 [1971]; Harris v. United States, 390 U.S. 234[1968]) justifies the

(Footnote continued next page)

Fourth, this Court has held that a warrant is not required to seize or search abandoned property. Abel v. United States, 362 U.S. 217, 241 (1960). Again, no showing of exigent circumstances is required. This Court's citation in Abel (id. at 241) to Hester v. United States, supra, indicates that the reason for the dispensation of the warrant requirement is that there is no property interest -- to use the pre-Katz talisman -- or no reasonable expectation of privacy -- to use the post-Katz rubric -- in the property seized.

(footnote 7 continued)

legality of the observation but does not justify the seizure. 1 Lafave, Search and Seizure, section 2.2, at 245 (1978). This Court has not required exigent circumstances, merely stating that it would be a "needless inconvenience" to require police to seek a warrant. Coolidge v. New Hampshire, supra, at 468.

Fifth, even the right to search an arrestee without a warrant as an incident to his arrest (Gustafson v. Florida, 414 U.S. 260 [1973]; United States v. Robinson, 414 U.S. 218 [1973]; Chimel v. California, 395 U.S. 752 [1969]), can be alternatively explained by the reduction in privacy of his person upon arrest. "I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. . . . The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest." United States v. Robinson, supra, 414 U.S. at 237-238 (Powell, J., concurring). This rationale explains United States v. Edwards,

415 U.S. 800 (1974), which upheld the seizure and search of the defendant's clothing several hours after his arrest. See id. at 808-809. It is clear that no exigent circumstances excused the failure to seek a warrant. Id. at 811 (Stewart, J., dissenting).

Finally, and most relevant to the issue before this Court, although packages in the mails (Walter v. United States, ___ U.S. ___, 100 S.Ct. 2395, 2400-2401 [1980]; United States v. Van Leeuwen, 397 U.S. 249 [1970], luggage (Arkansas v. Sanders, supra), and other repositories of personal effects (United States v. Chadwick, 433 U.S. 1 [1977]) may not be searched without a warrant, some containers will not "deserve the full protection of the Fourth Amendment" "because [for example] their contents can be inferred from their outward appearance."

Arkansas v. Sanders, supra, at 765-766 n.13. The inference to be drawn from the appearance of the package defeats any reasonable expectation of privacy. Ibid.

This review of representative cases yields the conclusion that, although a person may have a reasonable expectation of privacy to be free from unreasonable governmental intrusion, "the specific content and incidents of this right must be shaped by the context in which it is asserted." Terry v. Ohio, 392 U.S. 1, 9 (1968). Thus, the Fourth Amendment affords a "hierarchy of protection [which] arises not from the application of differing constitutional standards to various locales, but rather from an application of a single standard of reasonableness to all places in accordance with a fundamental understanding that a particular intrusion

into one domain of human experience seriously threatens personal security, while the same intrusion into another domain does not." People v. Dumas, 9 Cal.3d 871, 882-883, 512 P.2d 1208, 109 Cal.Rptr.304 (1973).

Petitioner argues that the Katz formulation plays no part in the analysis of the issue in this case because the test derived from Katz is intended to determine whether a search occurred at all. If it did, as in this case, he would require the issuance of a warrant, absent exigent circumstances (Pet.Brief at 36-40). Decisions of this Court, which have held that a reduced expectation of privacy dispenses with the warrant requirement, devastates petitioner's argument. E.g., United States v. Chadwick, supra, 433 U.S. at 12 (dictum); United States, v. Edwards, supra; Hester v. United States, supra;

see also Cupp v. Murphy, 412 U.S. 291, 294-296 (1973) ("limited intrusion" of scraping fingernails without warrant valid although defendant not under arrest).

One commentator has argued that recognition of gradations of privacy "converts the fourth amendment into one immense Rorschach blot," creating a "general sliding scale approach [which] could only produce more slide than scale." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev.349, 395-396 (1974). However, this fear ignores the teachings of the cases which have been discussed. It overlooks the principles that each case must be judged on its own facts (Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 [1931]), and that the ultimate question is whether a search -- in light of all the facts -- is reasonable. United States v. Edwards, 415 U.S. 800, 807

(1974); Cooper v. California, 386 U.S. 58, 61-62 (1967). The heart of the matter is that "the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to control those police investigative activities which have the potential to be most destructive of Fourth Amendment values." 1 LaFave, Search and Seizure, § 2.1, at 240 (1978). Assessment of the extent of the destruction requires a determination of the extent of the reasonable expectation of privacy breached by the activity.

In view of this somewhat extended discussion, we posit the following: Not all containers receive the same protection from the Fourth Amendment. Some may be searched without probable cause or a warrant. Cf. Abel v. United States, supra; Hester v. United States, supra. Some require the

existence of probable cause and the issuance of a warrant. United States v. Chadwick, supra; United States v. Van Leeuwen, supra. In the middle of the Fourth Amendment spectrum are those containers which may be searched upon probable cause alone. Arkansas v. Sanders, supra, n.13. We will now attempt to identify the criteria which will determine to what extent the containers in this case -- cookie tin, tote bags, plastic bags -- deserved protection of the Fourth Amendment.

B. THE KATZ EXPECTATION OF PRIVACY DOCTRINE.

Before turning to the specific issue presented by this case, namely, whether the police should have secured a warrant to search the containers found in petitioner's car we consider in somewhat greater detail the Katz rule,

as formulated by Mr. Justice Harlan: "[T]here is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'". 389 U.S. at 361.

The first requirement has been criticized on the ground that a subjective expectation can be neutralized by, for example, a governmental announcement that everyone is under comprehensive electronic surveillance. Amsterdam, Perspectives, supra, at 384; Note, A Reconsideration of the Katz Expectation of Privacy Test, 76 Mich.L.Rev.154, 158 (1977). Professor Amsterdam has suggested that the relevant question is "what we should demand of government." Fourth Amendment, supra, at 384. Another

commentator has suggested that what should be demanded, as a minimum content of the Fourth Amendment, may be determined under the traditional constitutionally protected areas test. (E.g., Silverman v. United States, 365 U.S. 505 (1961).) Note, supra, 76 Mich.L.Rev.at 182. This approach has received qualified acceptance from the Court. Rakas v. Illinois, supra 439 U.S. at 143 n.12.

The second inquiry is whether the expectation of privacy, if present, is reasonable. Courts do not make this determination by "fall[ing] back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases." Ibid. Rather, "other social considerations" determine which expectations are to be constitutionally enforced. Note, From

Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L.Rev. 968, 983 (1968). Justice Harlan believed that justifiable expectations "are in large part reflections of laws that translate into rules the customs and values of the past and present." United States v. White, 401 U.S. 745, 786 (1971)(dissenting opinion). This Court has reaffirmed that property concepts are relevant, although not dispositive, in "determining the presence or absence of the privacy interests protected by [the Fourth] Amendment." Rakas v. Illinois, supra, 439 U.S. at 143 n.12; see also United States v. Salvucci, ___ U.S. ___, 100 S.Ct. 2547, 2553 (1980); Rawlings v. Kentucky, ___ U.S. ___, 100 S.Ct. 2556, 2561 (1980).

As Professor Amsterdam sees it, the "ultimate question" is whether the

police practice, if "permitted to go unregulated by constitutional restraints, [would diminish] the amount of privacy and freedom remaining to citizens . . . to a compass inconsistent with the aims of a free society." Perspectives, supra, at 403. Amsterdam's position echoes that of Justice Harlan, who would have "assess[ed] the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." United States v. White, supra, 401 U.S. at 786 (dissenting opinion).

We conclude that the reasonableness of the search in this case must be determined by the "sense of security" which a reasonable man would have in the containers which were searched. That

sense is derived from the "customs and values of the past and present" as they relate to the intended purpose of the container and the way in which it actually was used. We now turn to an analysis of the cases bearing upon these issues to determine whether they provide criteria to decide the legality of the search of the containers in petitioner's car.

C. CONTAINERS DESERVING THE PROTECTION OF THE WARRANT CLAUSE.

United States v. Chadwick, supra, invalidated the warrantless search of a 200-pound double-locked footlocker. In discussing the defendant's expectations of privacy, this Court observed that "luggage is intended as a repository of personal effects." The contents of luggage "are not open to public view . . .; nor is luggage

subject to regular inspections and official scrutiny on a continuing basis." 433 U.S. at 13. In Arkansas v. Sanders, supra, pointing out that "the very purpose of a suitcase is to serve as a repository for personal items" (442 U.S. at 764), this Court held "that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations." Id. at 766. But the Court took pains to explain that not "all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . . [A] warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels

depends not at all upon whether they are seized from an automobile." Id. at 764-765 n. 13 (emphasis added).

This Court thus differentiated "luggage" from "containers", "packages" and "parcels". Since Chadwick and Sanders were decided, state and lower federal courts have had to categorize containers for the purpose of determining when the warrant requirement applied and when probable cause alone was constitutionally sufficient. As Sanders predicted, their efforts have not produced a coherent body of decisional law.

At one end of the spectrum, courts have been generally consistent in holding that a warrant is required to search such containers normally associated with personal luggage as suitcases, duffle bags, tote bags and knapsacks.

E.g., United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); United States v. Meier, 602 F.2d 253 (10th Cir.1979); United States v. Bloomfield, 594 F.2d 1200 (8th Cir.1979); United States v. Johnson, 588 F.2d 147 (5th Cir.1979); United States v. Stevie, 582 F.2d 1175 (8th Cir.1978) cert.den. 443 U.S. 911 (1979); United States v. Vallieres, 443 F.Supp.186 (D.Conn.1977); Scisney v. State, ____ Ark.____, 605 S.W.2d 451 (1980); People v. Minjares, 24 Cal.3d 410, 591, P.2d 514, 153 Cal.Rptr.224 cert.den., 444 U.S. 887 (1979); State v. Walker, 93 N.M. 769, 605 P.2d 1168 (1980); State v. Marcum, 24 Wash.App.441, 601 P.2d 975 (1979).[8/]

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8. One court held that the contents of a knapsack were legally seized because a bag of marijuana was on the outside and the flaps of the sack could easily be pushed aside to permit visual inspection. State v. Schrier, 283 N.W.2d 338 (Ia. 1979)

Briefcases have also been treated as repositories of personal effects which are deserving of the protection of the warrant clause. United States v. Presler, 610 F.2d 1206 (4th Cir.1979); United States v. Calandrella, 605 F.2d 236 (6th Cir.), cert.den. 444 U.S. 991 (1979); United States v. Schleis, 582 F.2d 1166 (8th Cir.1978); Webb v. State, 373 So.2d 400 (Fla.App.1979); Araj v. State, 592 S.W.2d 603 (Tex.Crim.Ap.1979).

At the other end of the spectrum, courts have been virtually unanimous in holding that paper bags are not entitled to the protection of the warrant clause. United States v. Sutton, 636 F.2d 96 (5th Cir.1981); United States v. Brown, 635 F.2d 1207 (6th Cir.1980); United States v. Honigman, 633 F.2d 1336 (9th Cir.1980);

United States v. Jiminez, 626 F.2d 39 (7th Cir.1980); United States v. Mackey, 626 F.2d 684 (9th Cir.1980); State v. Guzman, 362 So.2d 744 (La.1978); State v. Cavegn, 294 N.W.2d 717 (Minn.1980); State v. Johnson, 277 N.W.2d 346 (Minn.1979). Mackey explained that the paper bag "is among the least private of containers. It is easily torn, it cannot be latched, and, to a greater extent than most containers, its contents can frequently be discerned merely by holding or feeling the container." 626 F.2d at 687.

Between these antipodal situations lie a multitude of containers which offer varying levels of privacy. Courts have held that police are not required to seek warrants when they search: a department store box (United States v. Neumann, 585 F.2d 355 [8th

Cir.1978]; People v. Maldonado, 76 App. Div.2d 691, 431 N.Y.S.2d 580 [1980]; a soft drink cup with an opaque plastic top (People v. Diaz, 101 Cal.App.3d 440, 161 Cal.Rptr. 645 [1980]; a taped scrabble box (United States v. Gaultney, 581 F.2d 1137 [5th Cir.1978]); a pillow case (People v. Suennen, 114 Cal.App.3d 192, 170 Cal.Rptr. 677 [1980]); a tool box (Wyss v. State, 262 Ark.506, 558 S.W.2d 141 [1977]); an electric razor case (Cooper v. Commonwealth, 577 S.W.2d 34 [Ky.App.1979]); a match box (Duncantell v. State, 563 S.W.2d 252 (Tex.Crim.App.1978]); an envelope (United States v. Sanders, 631 F.2d 1309 (8th Cir.1980]); and 300 cardboard boxes, some of them broken open, in the hold of a ship (United States v. Blair, 493 F.Supp.398 [D.Md.1980]).

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Containers which courts have held are deserving of the warrant protection include: a guitar case (United States v. Bella, 605 F.2d 160 [5th Cir. 1979]); a shaving kit (Moore v. State, 594 S.W.2d 245 [Ark.1980]); a plastic portfolio (United States v. Miller, 608 F.2d 1089 [5th Cir.1979]); a camera case (State v. DeLong, 43 Or.App.183, 602 P.2d 665 [1979]); taped or sealed cartons (United States v. Dien, 609 F.2d 1038 [2d Cir.1979]); People v. Boyd, 86 Ill.App.3d 73, 407 N.E.2d 982 [1980]; State v. White, 94 N.M.687, 615 P.2d 1004 [1980]); a lunch pail (People v. Pace, 92 Cal.App.3d 199, 154 Cal.Rptr.811 [1979]); a candy tin (People v. Silvey, 110 Cal.App.3d 67, 167 Cal.Rptr.566 [1980]); a plastic cooler (United States v. Markland, 489 F.Supp.932 [D.Conn.1980]; contra, State

v. Heberly, 120 Ariz.541, 587 P.2d 260 [1978][ice chest]), and "boxes" of various functions (United States v. Isom, 588 F.2d 858 [2d Cir.1978] [dictum]; United States v. Ocampo, 492 F.Supp.1211 [E.D.N.Y.1980]; State v. Metcalfe, 593 P.2d 638 [Alas.1979]; People v. Dalton, 24 Cal.3d 850, 598 P. 2d 467, 157 Cal.Rptr.497 [1979], cert. den., 445 U.S. 946 [1980]; People v. Rinaldo, 80 Ill.App.3d 433, 399 N.E.2d 1027 [1980] [contained microwave oven]; contra, State v. Kahlon, 172 N.J.Supr.331, 411 A.2d 1178 [1980] [box partially open]).

Courts have divided over the admissibility of evidence taken from purses. The fruits of such searches have been held admissible in United States v. Moreno, 569 F.2d 1049 (9th Cir.1978); United States v. Venizelos,

495 F.Supp.1277 (S.D.N.Y.1980); Hinkel v. Anchorage, 618 P.2d 1069 (Alas.1980); Sumlin v. State, 587 S.W.2d 571 (Ark. 1979); Daigger v. State, 595 S.W.2d 653 [1980]; People v. Barnett, 113 Cal.App. 3d 563, 170 Cal.Rptr 255 (1980); People v. Harris, 105 Cal.App.3d 204, 164 Cal.Rptr.296 (1980); State v. Sabater, 601 P.2d 11 (Kan.App.1979), cert. den., 446 U.S. 518 [1980]; State v. Thompson, 596 P.2d 174 (Kan.App.1979); Dawson v. State, 40 Md.App. 640, 395 A.2d 160 (1978); State v. Webb, 560 S.W.2d 318 (Mo.App.1977). Contrary results were reached in United States v. Farrar, 470 F.Supp. 128 (S.D.Miss. 1979); People v. Redmond, 73 Ill.App.3d 160, 390 N.E.2d 1364 (1979); Bradford v. State, 401 N.E.2d 77 (Ind. App.1980); Ulesky v. State, 379 So.2d 121 (Fla.App.1979).

Nor have opaque plastic bags received consistent treatment. Their searches have been sustained in United States v. Mannino, 635 F.2d 110 (2d Cir.1980); United States v. Goshorn, 628 F.2d 697 (1st Cir.1980); and United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Morquecho, 474 F.Supp.1134 (S.D.Tex.1979); and Flynn v. State, 374 So.2d 1041 (Fla.App.1979), and condemned in United States v. Rivera, 486 F.Supp.1025 (N.D.Tex.1980), and State v. Blais, 416 A.2d 1253 (Me.1980).

This Court is asked to bring order out of the chaos which has followed Chadwick and Sanders. It is necessary to fashion a workable rule -- to be applied by all law enforcement officers -- to determine which containers deserve the warrant protection

and which may be searched upon probable cause alone. Petitioner insists that the warrant clause covers all containers which protect their contents from unwanted eyes (Brief at 30). He argues strenuously that all attempts to categorize containers with respect to the warrant clause must fail because certain crucial concepts defy definition. If the container to be protected by the warrant clause must be "normally intended to serve as a repository for personal effects," petitioner asks rhetorically: What is normal? Whose intent? What is a repository? What is a personal effect? (Brief at 30-36). No, counsels petitioner, the "plain truth" is that the warrant clause must protect all containers which function to keep out prying eyes (Brief at 34). A number of cases explicitly or impliedly

have adopted this position. See, e.g., United States v. Markland, supra, 489 F.Supp. 932; People v. Pace, supra, 92 Cal.App.3d 199, 154 Cal.Rptr.811; People v. Boyd, supra, 86 Ill.App.3d 73, 407 N.E.2d 982; State v. Blais, supra, 416 A.2d 1253.

Although superficially appealing, petitioner's position stands upon a legally untenable foundation. He asks this Court to vindicate subjective expectations of privacy in containers which keep out the prying eye. He ignores the dispositive question whether society is prepared to consider that expectation to be "reasonable" or "legitimate." Alternatively, he assumes that all manifested expectations of privacy are legitimate per se. His position runs contrary to an unbroken string of precedents from Katz to Rakas,

teaching that all expectations of privacy, however well justified, cannot be deemed to be legitimate without reference to the "customs and values of the past and present." If petitioner prevails, it will mean that the warrant clause protects the paper bag, the match box, the candy tin, the cigar box, the soda cup (provided the top is opaque), and any other container into which a person cannot look. Such a result will further tax the resources of law enforcement and trivialize the warrant clause of the Fourth Amendment. See 2 Lafave, Search and Seizure, section 7.2 at 78 (1981 Supp.) We do not believe that the framers of that Amendment, or of the Fourteenth Amendment, intended to require police to seek a warrant to search a cookie tin. What is more to the point, we do not believe that this

society's customs and values are threatened by the warrantless search, upon probable cause, of such a receptacle.

We submit that Katz, Chadwick, Rakas, and Sanders indicate the following rule: If a reasonable person, in light of all of the circumstances, has cause to believe that the container in question is a repository of personal effects, then a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle for such articles, then probable cause alone is sufficient to justify the search. In evaluating all of the circumstances, the searching police officer may consider the intended purpose of the container, its present use, how it is secured or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it

may emit. See United States v. Mannino, supra, 635 F.2d 110; United States v. Goshorn, supra, 628 F.2d 697; United States v. Rivera, supra, 486 F.Supp.1025. "Personal effects" comprises "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person. . . ." Annot., 30 A.L.R.3d 797, 811 (1970). "Papers," specifically mentioned in the Fourth Amendment, should be included under the rubric of "personal effects".

Under this test, in keeping with the spirit of Chadwick and the Fourth Amendment, luggage and briefcases normally could not be subjected to a warrantless search. But other containers, not "inevitably associated with the expectation of privacy" (Arkansas v. Sanders, supra, 442 U.S. at

762), could be searched upon probable cause alone, unless the searching officer is, or should be, aware of "specific and articulable facts" (Terry v. Ohio, 392 U.S.1, 21 [1968]), that it is being used to transport personal effects. Thus, if a visual and tactile examination of a paper bag reveals that it is taped shut, and its contents have the weight and consistency of clothing, the policeman should realize that it was intended to serve as a suitcase and treat it as such. If, although sealed, the bag reveals that its contents have the weight and consistency of marijuana, and the odor of marijuana emanates from the bag, there is no reason to believe that the paper bag is a repository for personal effects and may be searched because there is probable cause to believe that it contains contraband.

We believe that the foregoing rule strikes the proper balance between the public need for the detection of crime and the private need for security in one's personal belongings. Surely there is a greater need for privacy in a suitcase than in a tool box. The customs and values of this society dictate that our senses of security in those containers must differ. An item of wearing apparel is simply not the same as a crescent wrench. We recognize that not all can afford suitcases and briefcases to transport personal belongings, but most can take steps to insure their privacy in whatever container they choose. Thus, if the steps they take, as well as the surrounding circumstances, indicate that the container houses personal effects, then a warrant must issue before it is searched. This Court

recognized that there "will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." Arkansas v. Sanders, supra, 442 U.S. at 765 n.13. Those difficulties can be largely overcome by requiring a police officer to seek a warrant before searching a container which he knows, or reasonably should know, houses personal

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effects.[9/] Both petitioner and amicus curiae take issue with footnote 13 of Sanders. Petitioner argues that it is factually inapplicable to this case, for the footnote suggests that the containers which may be searched without a

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9. This rule, however, should not apply to containers, even those holding personal effects, which are within the immediate control of an arrestee at the time of his apprehension. See United States v. Chadwick, supra, 433 U.S.at 14-15; Chimel v. California, supra, 395 U.S. at 763. Thus, wallets, purses, handbags, and other such articles in the possession of the arrestee should be subject to a warrantless search. See United States v. Venizelos, 495 F.Supp. 1277, 1281-1282 (S.D.N.Y. 1980). The conceptual basis for the search is that the arrest and seizure of a person abates any privacy interest in his personal effects in his immediate possession at the time of his arrest. See United States v. Edwards, supra, 415 U.S.800; United States v. Robinson, supra, 414 U.S. at 237-238 (Powell, J., concurring); People v. DeSantis, 46 N.Y.2d 82, 87, 385 N.E.2d 577, 579, 412 N.Y.S.2d 838, 840 (1978), overruled in People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980) cert. granted, 49 U.S.L.W. 3509 (1981).

warrant are those which identify their contents (e.g., a gun case). Petitioner's containers were not "self-identifying"[10/] (Brief at 52). Amicus goes even further, insisting that it is inconsistent with established Fourth Amendment doctrine: "The outward appearance of a container can provide no more than probable cause; it cannot excuse the failure to obtain a warrant" (Amicus at 3). The answer to both arguments is identical: If the outward appearance of a container indicates that it is not a repository of personal

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10. It is interesting to note that petitioner is willing to concede a plain sight exception, but not a "plain smell exception" to the warrant clause, a "neat but indefensible sergregation of the human senses . . . ." People v. Marshall, 69 Cal.2d 51, 62, 442 P.2d 665, 69 Cal.Rptr. 585 (1968) (Mosk, J., dissenting). In terms of expectations of privacy, we fail to perceive any valid distinction between the two sensory perceptions.

effects, then there is no reasonable expectation of privacy so elevated that a warrant is necessary to search it.

D. THE SEARCH OF THE CONTAINERS

We now turn to the question whether the search of petitioner's containers[11/] violated the Fourth Amendment. Petitioner does not dispute that the stop of his car was justifiable. Cf. Pennsylvania v. Mimms, 434 U.S. 106 (1977). Nor does he contend that the strong odor of marijuana emanating from

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11. In the California Court of Appeal, we conceded that the search of the cookie tin and the tote bag was invalid. 101 Cal.App.3d 15 39, 182 Cal.Rptr. at 982. We believed that the concession was necessary in view of this State's decisional law as it existed at that time. E.g., People v. Minjares, supra, 24 Cal.3d 410, 591 P.2d.514, 153 Cal.Rptr.224; People v. Dalton, supra, 24 Cal.3d 850, 598 P.2d 467, 157 Cal.Rptr.497; People v. Pace, supra, 92 Cal.App.3d 199, 154 Cal.Rptr.811. We no longer believe that the concession is necessary and do not make it in this Court.

his station wagon was insufficient probable cause to search the vehicle and its contents. See United States v. Rivera, supra, 486 F.Supp.at 1033 (dictum); cf. Johnson v. United States, supra, 333 U.S.at 13. Probable cause was substantially augmented by petitioner's voluntary statement: "What you are looking for is in the back." He contends, quite simply, that 1:45 a.m. the officers should have left the highways unpatrolled while they secured a warrant before searching the cookie tin, tote bag, and plastic bags.

We first consider the cookie tin. The officers had probable cause to believe that it contained marijuana, but had no reason to think that it was used as a repository for personal effects. Nothing about the tin suggested that petitioner used it to store a razor kit,

toiletries, jewelry, or the like. In the absence of any such evidence that petitioner used the cookie tin to store anything other than marijuana (or cookies), it cannot be said that petitioner manifested an expectation of privacy which society must legitmate.

We next consider the green plastic bags. They are not "inevitably" repositories of personal effects, but it is true that petitioner exhibited an intent to secret their contents from the outside world by taping them. However, the officer's sensory inspection, permitted by Chadwick, would negate totally any inference that they contained personal effects. Each bag weighed 15 pounds, and held a form which had the shape, weight, and consistency of a marijuana brick. Had Officer DePue smelled the bags before opening them,

he undoubtedly would have noticed the pungent smell emitted by the marijuana bricks. We conclude that nothing about the circumstances would have indicated to a reasonable observer that the packages contained personal effects. This conclusion would not be altered even if the smell of marijuana did not emanate from the bags. For all the officers could see, the bags contained "mere cargo" and were not entitled to the protection of the warrant clause. See United States v. Gooch, supra, 603 F.2d 122.

In addition, it is doubtful that petitioner could claim a subjective expectation of privacy, for he told the officer that "it" was "in the back." We do not claim, at this late date, that petitioner consented to the search of

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his bags.[12] See Schneckloth v. Bustamonte, supra, 412 U.S. 218. We do submit that his utterance negated any expectation that the officers would seek a warrant before searching the bags. Therefore, society did not grant, nor did petitioner possess, in the plastic bags an expectation of privacy which required the issuance of a search warrant.[13]

We therefore submit that the containers, having the same level of privacy as the car, could be searched along with the car on the basis that there was probable cause to believe that they contained marijuana. See United States v. Mannino, supra, 635 F.2d at

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12. The issue was never litigated because, prior to the unforeseeable result in Chadwick, it was lawful to search containers in cars.

13. We do not make a similar contention about the tote bag.

115; cf. Arkansas v. Sanders, supra, 442 U.S. at 766-768 (Burger, C.J., concurring).

II

EVIDENCE SEIZED IN REASONABLE RELIANCE UPON FEDERAL AND STATE CASES VALIDATING THE SEARCH SHOULD NOT BE SUPPRESSED BECAUSE OF A SUBSEQUENT CHANGE IN THE LAW.

We will assume, without conceding that search in this case was invalid under Chadwick. But that is only the beginning, not the end, of the inquiry, because the illegality of a search does not necessarily require suppression of the evidence seized. Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this Court -- or any court -- must balance its costs against its benefits. See United States v. Calandra, 414 U.S. 338, 348-51

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(1974); Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev.1027, 1032-35 (1974). Typically, the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt is proven by the supressed evidence. Note, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 U.C.L.A.L.Rev. 1129, 1149 (1973). When the cost is greater than the benefit, the evidence is not excluded. United States v. Calandra, supra. It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose."

Michigan v. Tucker, 417 U.S. 433, 446 (1974).

The search occurred in this case in January of 1975, two and one-half years before Chadwick and four and one-half years before Sanders. At that time, cases of this State (People v. McKinnon, 7 Cal.3d 899 [1972]; People v. Vermouth, 20 Cal.App.3d 746, 98 Cal.Rptr.65 [1971]), and of federal appellate courts (United States v. Giles, 536 F.2d 136 [6th Cir.1976]; United States v. Canada, 527 F.2d 1374 [9th Cir.1975]; United States v. Tramunti, 513 F.2d 1087 [2d Cir.1975]; United States v. Anderson, 500 F.2d 1311 [5th Cir.1974]; United States v. Soriano, 497 F.2d 147 [5th Cir.1974] [en banc], reaffirmed sub.nom United States v. Aviles, 535 F.2d 658 [1976]; United States v. Evans, 481 F.2d 990 [9th

Cir.1973]), upheld the warrantless search of containers for evidence of crime if police had probable cause.[14/]

It bears repeating that the essential purpose of the exclusionary rule is to deter police misconduct. Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979); Stone v. Powell, 428 U.S. 465, 484 (1976); United States v. Peltier, 422 U.S. 531, 542 (1975); Michigan v. Tucker, 417 U.S 433, 446 (1974); United States v. Calandra, 414 U.S. 338, 347 (1974). In Peltier, the Court refused to exclude evidence discovered by searches which arguably complied with existing law. The Court declared: "If the purpose of the exclu-

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14. Accord, Clark v. State, 574 P.2d 1261 (Alaska, 1978); State v. Elliott, 605 P.2d 930 (Haw. 1980); State v. Downes, 31 Or.App. 419, 571 P.2d 914 (1977); Commonwealth v. Berman, 396 A.2d 1237 (Pa. Super. 1978).

sionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 542.

Peltier reiterated the reasonable, good faith standard for exclusion set down a year earlier in Michigan v. Tucker, supra, 417 U.S. at 447:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those

particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."[15/]

In this case, it is clear that Officer DePue reasonably and in good faith relied upon the then-prevailing rule that containers in a car as well as

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15. The modification of the Exclusionary Rule to conform to the good faith standard has been espoused by Chief Justice Burger (Stone v. Powell, supra, 428 U.S.at 498 [conc.opn.]), Justice Powell (Rakas v. Illinois, supra, 439 U.S. at 156 n.5 [conc.opn.]; Brown v. Illinois, 422 U.S. 590, 609-610 [1975] [conc.opn.]), Justice White (Stone v. Powell, supra, 428 U.S. at 538 [dis.opn.]), and Justice Rehnquist (United States v. Peltier, supra; Michigan v. Tucker, supra). See United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

the vehicle itself may be searched for probable cause. "[U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm." United States v. Peltier, supra, 422 U.S. at 542.

In this connection, we note that Chadwick has been held to be prospective, applying only to searches conducted after the day it was decided.[16/] United States v. Calandrella, 605 F.2d 236 (6th Cir.1979); United States v.

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16. Although the search in Arkansas v. Sanders occurred prior to the decision in Chadwick, the State of Arkansas did not argue that Chadwick should be prospectively applied. Thus, until now, this Court has never been asked to decide the temporal application of Chadwick.

Cornejo, 598 F.2d 554 (9th Cir.1979); United States v. Stewart, 595 F.2d 500 (9th Cir.1979); United States v. Choate, 576 F.2d 165, 182 n.20 (9th Cir.1978), United States v. Berry, 571 F.2d (7th Cir. 1978); United States v. Reda, 563 F.2d 510(2d Cir.1977); United States v. Montgomery, 558 F.2d 311 (5th Cir.1977); State v. Conti, 573 S.W. 2d 95 (Mo.Ct. App.1978); Commonwealth v. Berman, 396 A.2d 1237 (Pa.Super.1978); Kemner v. State, 589 S.W.2d 403 (Tex.Crim.App. 1979); contra, United States v. Stevie, supra, 582 F.2d 1175; United States v. Schleis, supra, 582 F.2d 1166; People v. Minjares, supra, 24 Cal.3d 410, 591 P.2d 514, 153 Cal.Rptr.224. The vast majority of the courts considering the question have agreed that, prior to Chadwick, officers who searched containers in cars were reasonably relying upon the

"prevailing constitutional norm."[17/]

This Court will not invoke the exclusionary rule to suppress relevant evidence, free the guilty and punish society unless a compelling social purpose is to be served. See, e.g., United States v. Calandra, supra. In this case, because Officer DePue could not anticipate the formulation of the Chadwick-Sanders rule at the time he conducted the search in the early morning hours of January 5, 1975, the suppression of the evidence would be a

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17. In our opposition to petitioner's first petition for writ of certiorari (No. 78-567), we argued that the rule of Chadwick should apply prospectively. We did not make this argument in the state court after remand because it had been rejected in People v. Minjares, supra. It was, therefore, not abandoned, and may now be made in this Court.

This resolution of this issue is crucial to respondent, for there exists a conflict between this State and the Ninth Circuit.

meaningless sanction, even if this Court concludes that Chadwick today would compel suppression. See United States v. Calandrella, supra, 605 F.2d at 247-252 (fruits of search violating Chadwick held admissible because Chadwick prospective).[18/]

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18. We relegate to a footnote our response to petitioner's curious argument that the court of appeal somehow violated this Court's mandate when it reinstated the judgment of affirmance on new grounds not encompassed within its prior opinion. In 1978, the lower court upheld the search of the containers under the then-established exception to the warrant requirement permitting the probable-cause search of cars and their containers. After this Court's decision in Arkansas v. Sanders, supra, this Court granted certiorari and remanded this case to the court of appeal for reconsideration in light of Arkansas v. Sanders.

Having been told by this Court that there no longer was a "container exception" to the warrant requirement, the court of appeal was obliged to decide whether, under Sanders, the search nevertheless could be sustained

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(Footnote 18 continued)

under other, narrower grounds delineated in that opinion. In footnote 13, this Court explained that not all containers deserved the protection of the warrant requirement and that the nature of the package was relevant in determining expectations of privacy. The lower court decided that the packaging exposed the nature of its contents. This ground was not stated in the court's first opinion because it was unnecessary and because, prior to footnote 13, it really did not exist.

In any event, because the search of the container was reasonable and the evidence was properly admitted, petitioner's argument is moot.

CONCLUSION

For the foregoing reasons, we submit that the judgment of the California Court of Appeals should be affirmed.

DATED:

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
to the Court of Appeal, State of California,
First Appellate District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

FACTUAL MATTERS

At page 6 of the Solicitor General's brief the United States takes the position that "nothing in petitioner's conduct signaled that he viewed these parcels as matter deserving of protection on a par with luggage." To the contrary, petition-

er's packages were securely wrapped and tape-secured parcels, which were placed in a closed luggage compartment along with other luggage. It would be hard to find a more incorrect statement than that of the Solicitor General.[1]

The Solicitor General (at p. 11 of the brief) cites United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) as a holding that paper bags and plastic wrapped bags are not protected by the Warrant Clause of the Fourth Amendment. In fact, that case held that the question depended upon the facts developed in the trial court with regard

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[1] It is urged by the Solicitor General that petitioner's alleged statement to the police, "What you are looking for is in the back," precludes a claim that he had subjective privacy expectations in the contents of the luggage compartment. Respondent, however, has already conceded that petitioner had subjective expectations of privacy in the contents of the securely wrapped packages. (Opposition to Petition for Writ of Certiorari, at 10.) The circumstances under which this involuntary statement was made are described at pages 5 and 6 of Petitioner's Brief and the statement has never been urged or relied on as a valid consent.

to the owner's treatment of such parcels and remanded for a new hearing to the District Court. On that new hearing, the District Court found that the plastic wrapped paper bags in that case were entitled to the protection of the warrant clause. See United States v. Goshorn, ___ F.Supp. ___, Crim. No. 79-215-N (March 6, 1981, USDC, Mass., Nelson, D.J.).

The Solicitor General makes a serious misstatement of fact in footnote 8, pp. 14-15 of his brief. He states that the officer "could feel" the contents of the package possessed by petitioner. What this package felt like is unknown on this record as no one asked the arresting officer whether he felt the packages before opening them and there is absolutely no testimony that he did feel them. The Solicitor General's conclusion that "parcels of this sort are generally unlikely to have very private contents" (brief,

footnote 8) is unsupported by the record. Petitioner's packages could just as well have been shoeboxes containing private papers, parcels wrapped for mailing which had not yet received a mailing label or any other private matters. Certainly there is no requirement in Ex Parte Jackson that a parcel be wrapped to make it apparent that is is destined for dispatch by mail as is argued by the Solicitor General, brief, footnote 9. In fact, Jackson holds that all parcels, wherever they may be found, are protected by the warrant clause and not just those dispatched by mail.

The Solicitor General does concede that sealing a package with tape could manifest the owner's special expectation of privacy in that package. Brief, p. 19. However, he then speculates that the tape in our case was used simply to form a container and prevent spillage. Once again, there is utterly no evidence of this in the re-

cord. So far as the record is concerned the packages were securely wrapped and taped.

The Attorney General speculates that the arresting officer "undoubtedly" would have noticed the pungent smell of marijuana from these packages. Brief, p. 61. There is no testimony that the packages had any smell whatsoever.

Since both the Attorney General and the Solicitor General refer to the probable cause which justifies the search in this case, petitioner should say that he does not concede probable cause for either the highway stop or the search of the rear of his vehicle. However, petitioner did not raise these issues in the Petition for Certiorari.

II

THIS CASE DOES NOT INVOLVE A RETROACTIVITY PROBLEM BECAUSE THE LAW PETITIONER RELIES UPON WAS THE LAW AT THE DATE OF THE ILLEGAL SEARCH

Both the respondent and Solicitor General argue that petitioner is seeking to retroactively apply new law to his case to show that the search was unconstitutional under United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979). This is incorrect. The law petitioner is invoking was in effect at the time his securely wrapped packages were opened and searched without a warrant.

It is apparent from a reading of Chadwick that this Court applied the existing warrant requirement to defeat the three arguments the government made in that case, namely that the warrant requirement should only apply to searches in the home, that the locked footlocker should be treated in the same way as an automobile under the

principles of Carroll v. United States, 267 U.S. 132, and that the footlocker search was incident to the arrest. It was the government which tried to create new law in Chadwick, not the defendant. In rejecting the government's argument this Court stated:

> Moreover, in this area we do not write on a clean slate. [433 U.S. at 9.]

The slate had been occupied by many previous cases holding that absent specific narrow exceptions the Fourth Amendment requires that the judgment of the magistrate intervene between the police officer and the citizen before a search is accomplished. These cases extend at least as far back as Ex Parte Jackson (1878) 96 U.S. 727, 733. Of course, police are required to know and act in a manner consistent with the "core doctrine" of constitutional law.

Our point is reinforced when the lower court opinions in Chadwick are examined.

In the District Court (United States v. Chadwick, 393 F.Supp. 763) Judge Tauro in suppressing the seized evidence relied upon the rule of Katz v. United States, 389 U.S. 347 (1967), that warrantless searches are per se unreasonable and rejected the government arguments that the warrant requirement should not be applied. In the First Circuit (United States v. Chadwick, 532 F.2d 773) the government pressed the same arguments which it did in this Court and they were rejected with the court holding that the warrant requirement had been violated. Therefore, to argue that the Chadwick case in this Court established new law is to fly in the face of the history of that case as well as the history of the Fourth Amendment's warrant clause.

We would also like to point out several other factors which bear upon this argument. First, this Court in Sanders, supra, ap-

plied the Chadwick rule to the search in that case which took place before the Chadwick opinion was filed. It may be true that the State of Arkansas did not urge retroactivity in its briefs or argument before this Court, but it is also true that this Court applied the Chadwick rule to the search in Sanders without hesitation because the warrant requirement was not new law. What was new was the argument of the State of Arkansas that merely because a closed container was found within an automobile that the warrant requirement was not applicable. The rejection of that argument by this Court does not, of course, mean that the rule of law is created by this rejection. Indeed, Justice Powell for the Court found "no justification for the extension of [Carroll] and its progeny to the warrantless search of one's personal luggage merely because it was located in an auto-

mobile lawfully stopped by the police." (Sanders, supra, at 765, emphasis added.) Such has long been the established rule of this Court. See Chambers v. Maroney, 399 U.S. 42, 50 (1970, per Justice White); Coolidge v. New Hampshire, 403 U.S. 443, 479-481 (1971, per Justice Stewart); South Dakota v. Operman, 428 U.S. 364, 382 (1976, concurring opinion of Justice Powell); Cardwell v. Lewis, 417 U.S. 583, 591, 592, n. 8 (1974, per Justice Blackmun).

Second, in this very case this Court granted petitioner's previous petition for certiorari (Robbins v. California, No. 78-567) and vacated the judgment with directions that the case be remanded to the Court of Appeal for further consideration in the light of Arkansas v. Sanders. While it is true that Bowen v. United States, 422 U.S. 916 (1975) involved a similar procedural remand and a later holding that an intervening United States

Supreme Court decision was not retroactive, we think it unlikely that in our case this Court wished a retroactivity ruling in the light of the fact that Chadwick had just been applied retroactively in the very case for which a remand was made, Arkansas v. Sanders.

Thirdly, California is free to make its own decision on retroactivity of a Fourth Amendment interpretation regardless of the rule for federal courts. The court below did not even discuss retroactivity nor was it argued by the Attorney General. The court below proceeded to apply Arkansas v. Sanders. The California Supreme Court has also applied Arkansas v. Sanders and Chadwick v. United States retroactively. People v. Minjares, 24 C.3d 410, 421, n. 6, holding Chadwick did not accounce a new rule of law. This is an area where states should be free to make their own decisions regarding retroactivity, so long as there

is no conflict with a specific ruling of this Court that a particular Fourth Amendment interpretation is retroactive.

Lastly, both the respondent and the Solicitor General argue for a new constitutional rule which would be that there is no reasonable expectation of privacy in what they choose to term insubstantially wrapped packages and therefore the warrant requirement should not apply to such packages. If the issue of insubstantially wrapped packages is indeed a new constitutional issue (which we challenge) then the application of the law thus created is necessarily retroactive to the search involved in the case deciding that new issue. Stovall v. Denno, 388 U.S. 293.

III

THE SUGGESTED NEW EXCEPTIONS TO THE WARRANT CLAUSE ARE NEITHER LAWFUL NOR PRACTICABLE

Neither the Attorney General of California nor the Solicitor General of the United States makes any attempt to defend the court below in deciding this case under footnote 13 of Sanders. We now examine the tests they suggest for adoption as constitutional principles.

A. Reply To The Attorney General

Respondent essentially argues that "petitioner's expectation of privacy in the containers searched was not so intense that a search warrant was required." (Brief for Respondent, p. 14, emphasis added.) In order to find the point on the gradient scale of intensity where a warrant is required, respondent creates the following novel test:

> If a reasonable person, in light of all of the circumstances, has cause to believe that the container in question is a repository of personal effects, then a warrantless search is prohibited. If, however, there is no reason to believe that the container is a receptacle for such articles, then probable cause alone is sufficient to justify the search. In evaluating all of the circumstances, the searching police officer may consider the intended purpose of the container, its present use, how it is secured or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it may emit. [Citations omitted.] "Personal effects" comprises "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person."
> (Brief for Respondent, pages 51-52.)

No court has ever articulated such a rule. The rule, indeed, is flatly contrary to Ex Parte Jackson, 96 U.S. 727, which protects "sealed packages . . . in the mail . . . as if they were retained by the parties" and packages "closed against in-

spection wherever they may be." Id. at 733 (emphasis added). Jackson extends the Warrant Clause to such packages irrespective of whether the package puts the world on notice that it contains clothing, "tangible property having some intimate relation to the person," or papers. For it is a rare package that travels in the hands of a public carrier that permits the observer to do any more than guess what is inside. And it is exactly because of their nondescript quality that such parcels are private. As this Court indicated in Arkansas v. Sanders, 442 U.S. 753, when the "contents of a package can be inferred from their outward appearance" the expectation of privacy is lessened. Id. at 764-765, n. 13. A package which discloses that its contents are jewelry, or money, or papers is less private than the packages in our case.

The proposed rule would appear to

protect only luggage, briefcases and other types of containers which put the world on notice that certain types of personal effects might be inside. But reasonable expectation of privacy extends far beyond such containers. Luggage is commonly used by someone who is traveling away from his home. But if someone is traveling across town, or not traveling at all, luggage would not commonly be used to store or carry personal effects. In such case, the person would be more likely to use a box, a bag, a tin, a briefcase, or some other similar container. Of these, respondent would apparently protect only the briefcase. But not everyone has a briefcase. Lawyers and certain types of middle level corporate executives have briefcases, but not the blue collar worker, the secretary, the housewife, the high school student, the waitress, or the auto mechanic. And even if a briefcase is possessed, it may

already be filled, or it may be too small to carry the private objects in question.

Respondent offers no reason for limiting Warrant Clause protection to only "such tangible property as is worn or carried about the person, or tangible property having some intimate relation to the person." (Brief for Respondent at 52.) Such a limitation would appear to place books, movies, photographs, tape recordings, gold, silver, and other property not worn on the body outside the protection of the Warrant Clause. Such property, however, is ordinarily much more private than the shirts, pants, hosiery, and razor kits which respondent wishes to protect.

Respondent's proposed rule would create an exception to the Warrant Clause large enough to exclude most of what the Warrant Clause is designed to protect. Yet the rule is that exceptions to the Warrant Requirement are "few" and "jealously guarded" and are limited to those cases where the

societal costs of obtaining a warrant, such as danger to law officers, or the risks of destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate. Jones v. United States, 357 U.S. 493, 499 (1958); United States v. United States District Court, 407 U.S. 297, 318 (1972). The exception proposed by respondent obviously does not satisfy these standards.

The proposed exception to the Warrant Clause is likewise so vague that it invites case by case evasion instead of analysis. It asks the policeman in the heat of ferreting out crime to feel a package, smell it, and presumably shake it to guess what is inside. After this examination, respondent would have the police decide whether a reasonable man would have cause to believe personal effects were inside, taking into account "the intended purpose of the container, its present use, how it is secured

or sealed, how it is stored, its outside markings, its weight and consistency, and any odor it may emit." (Brief for Respondent at 51-52.) But how does a container get an "intended purpose?" Whose intention? How does the police officer know its "present use" until the container is opened up? How does the method of securing or sealing indicate whether or not "property worn or carried about the person" is inside the parcel? How does "the method of storage" indicate whether "property . . . worn or carried about the person" is inside the parcel? How does the weight of a package "closed against inspection" indicate what is inside? How does the consistency of the container indicate what is inside? Just how relevant are outside markings? It is common knowledge that containers are re-used and that a shoebox does not always contain shoes.

The vague rules of this sensory guess-

ing game are shown by respondent's application of them in this case. For all anyone could tell, the nondescript packages in this case could have contained any number of personal effects. The packages presented the "visual impression of . . . package(s) that had been tightly wrapped for shipment by mail." (Dissenting Opinion, at A-10 and A-11, app., Petition For A Writ of Certiorari.) The storage of the packages in a secure luggage compartment along with luggage items notified the officers that the packages were the functional equivalent of luggage. The secure wrappings likewise put the officers on notice that personal effects might be inside. Yet respondent evaluates these facts and takes them to suggest that the container was not a repository of personal effects.[2]

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[2] Likewise, respondent urges that the appearance of a cookie tin does not cause one to believe that personal effects may be inside. But it is common knowledge that people sometimes employ cookie tins to store small personal items such as jewelry, letters and postcards. In any event, the cookie tin is not before this Court as its protection under Sanders was conceded in the court below.

Thus the rule urged by the Attorney General draws no clear line and creates an exception to the Warrant Clause large enough to exclude most of what the Warrant Clause is designed to protect.

B. Reply To The Solicitor General

The Solicitor General proposes a different exception to the Warrant Clause for "searches of various kinds of bags and insecure parcels" (Brief for the United States as Amicus Curiae at 14). Nevertheless, the Solicitor General qualifies his exception by noting that even the search of such containers may require a warrant when "by reason of particular features, the appearance of a parcel, its surroundings, the conduct of the person claiming Fourth Amendment protection or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily em-

ployed for nonprivate use" that a warrant may be required. (Brief for the United States as Amicus Curiae, p. 15, n. 9.)

Whatever the merit of these contentions, they have no bearing in this case since it is undisputed that the parcels in this case were "securely wrapped." In their March 4, 1980 opinion, the California Court of Appeal found that the packages were "tape secured" (Petition For A Writ of Certiorari, No. 80-148, p. A-5.) Likewise, in their May 9, 1978 opinion, the Court of Appeal found that the packages were "securely wrapped." (Petition For A Writ of Certiorari, No. 78-567, p. iii.) The photograph in evidence shows a "package that had been tightly wrapped for shipment by mail, or to protect its contents, or for both purposes." (Dissenting Opinion, Petition For A Writ of Certiorari, No. 80-148, p. A-11.) But inasmuch as the Solicitor General raises the issue of a Warrant

Clause exception for searches of "various kinds of bags and insecure parcels," petitioner offers the following comments.

The Solicitor General's sole contention is that "insubstantial" containers ordinarily involve less expectations of privacy than substantial containers and that therefore a warrant should not be required. Their assumption that "insubstantial containers" involve lower expectations of privacy, however, is totally unproven. Consider the ordinary envelope. What less substantial container could there be? It is not a "personal sanctuary." It has little "structural integrity" and can be easily torn. Yet a person who carries a sealed envelope expects the privacy of its contents to remain inviolate. If he puts the envelope down on his desk, or on a car seat, he does not lose his right of privacy.

Even if the envelope is unsealed, the

expectations of privacy are substantial. As Justice Jackson questioned, "If it were wrong to open a sealed envelope . . . would it have been right if the mucilage failed to stick?" Harris v. United States, 331 U.S. 145, 197, 91 L.Ed. 1399, 67 S.Ct. 1098 (1947) (dissenting opinion).

The expectation of privacy which society should be prepared to recognize as "reasonable" or "legitimate"[3] should not

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[3] Both the respondent and the Solicitor General distort the "legitimate" expectation of privacy standard. This Court has given the following explanation of this standard:

> [A] "legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one that the law recognizes as "legitimate" . . . his expectation is not "one that society is prepared to recognize as 'reasonable'." Katz v. United States (1967) 389 U.S. 347, 361. (Harlan, J., concurring). Rakas v. Illinois (1978) 349 U.S. 128, 143-144, n. 12.

A burglar in someone else's cabin is hardly comparable to a driver of his own automobile with securely wrapped packages in his luggage compartment.

turn on the presence or absence of locks and seals. Locks and seals "have nothing to do with legitimate expectations of privacy where the police are concerned. We lock our things to keep out those disposed to violate the law, not those who enforce it." People v. Pace, 92 Cal.App.3d 199, 205 (1979).

Except for those who may view the streets of our society as an armed camp, any container which preserves the privacy of its contents creates a legitimate expectation that the privacy will not be violated. And even those who feel threatened in the streets would do well to employ a nondescript bag rather than a piece of luggage which invites curiosity about the value of its contents.

Essentially the Solicitor General asks this Court to override the presumption in favor of warrants and to produce a new exception to the Warrant Clause for so-called

"insubstantial containers." No such exception is required since the principles underlying the Warrant Clause already deal with such needs. Emergencies, material in plain view, consent and other waivers have been designed to and do protect societal needs.[4] The Solicitor General identifies no particular "societal needs" to justify the exception they propose.

Unfortunately, the Solicitor General does not apply his "insubstantial test" in a straightforward fashion. He urges that the packages in this case, which the California Court of Appeal found were "securely wrapped" (Opinion at iii, Petition For A Writ of Certiorari, No. 78-567) and "tape

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[4] If a container is actually so insubstantial that it is torn, the contents may be in plain view and the right to a warrant may be waived. But if the wrappings of a parcel are not torn, what are the "identified needs of society" which require the police to tear it open without a warrant? Or if a container in an automobile is litter, a paper cup or any other trivial container, it might be argued that privacy has been waived or that the police are not on notice of privacy interests.

secured" (Opinion at A-5, Petition For A Writ of Certiorari, No. 80-148), are "insecure parcels." Likewise, although the Solicitor General claims that the policeman should take into account the location of the package and the precautions taken to secrete it (Brief For The United States As Amicus Curiae at p. 15, n. 9), the Solicitor General ignores the fact that the packages in this case were located alongside luggage in a luggage compartment under the floor in the rear deck of a station wagon.

Given this type of application of their own test, one must ask what kind of line this test draws. How well hidden must a container be before the police are to be deemed to be on notice that the location is an indicia of privacy? How "substantial" must the package be to pass the test? How much "structural integrity" is enough? These questions led the en banc United

States Court of Appeals for the District of Columbia to reject the Solicitor General's test in an opinion, the reasoning of which we adopt. United States v. Ross, ___ F.2d ___ (March 31, 1981).

As Justice Cardozo articulated in another context, administrative discretion must not be "unconfined and vagrant. It [must be] canalized within banks that keep it from overflowing." Panama Refining Co. v. Ryan, 392 U.S. 388, 440 (1935) (dissenting opinion). Tests founded upon subjective evaluations of whether an expectation of privacy is so "intense" or a container is so "substantial" fail to create any banks at all.

IV

CONCLUSION

The District of Columbia Circuit has rendered an important en banc decision in

United States v. Ross (No. 79-1624, March 31, 1981) which is a powerful protection for opaque packages lawfully seized by the police. While petitioner's packages were even more securely sealed and protected than the pouch and paper bag involved in Ross, and thus the full extent of the Ross decision need not be passed upon in this case, its discussion is enlightening.

Eight judges[5] agreed in Ross that a warrant is required for the opening of an opaque container lawfully seized by the police, absent emergency conditions. They pointed out that there is already such protection for "luggage" whether locked or unlocked and whether in public view or not. They held that a constitutional rule protecting "luggage" but not less expensive

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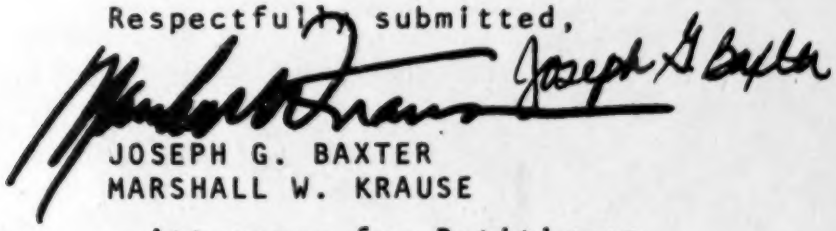
[5] Seven judges signed the majority opinion and Judge Wilkey agreed with it on the merits, dissenting on a retroactivity point. Three judges dissented on the point that a paper bag qualifies as "luggage."

containers would protect the wealthy, the well-advised and the fastidious at the expense of the general population and that a rule based upon durability of the container would impose an "unreasonable and unmanageable burden on police and courts." (Slip opinion, p. 4.) It held that the insubstantial container rule "would destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant." (Slip opinion, p. 22.)

For the reasons stated, the judgment below deprives petitioner and countless others of precious constitutional rights of security and privacy and must be reversed.

Dated: April 15, 1981

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of 18 years, employed in the County of Marin, in which county the within mentioned mailing occurred, and not a party to the within mentioned cause. My business address is Wood Island, Suite 207, 60 E. Sir Francis Drake Blvd., Larkspur, CA 94939. On April 17, 1981 I served the within Petitioner's Reply Brief on the parties in said action by placing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Larkspur, California, addressed as follows:

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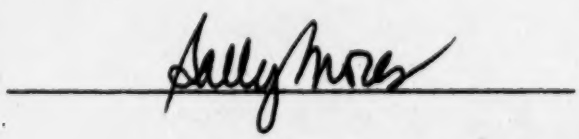
I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 17, 1981, at Larkspur, California.



No. 80-148
IN THE

Supreme Court of the United States

October Term, 1980

JEFFREY RICHARD ROBBINS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Coren, S., C. Porac, & L. M. Ward, Sensation and Perception, pp. 418-19 (1979) 6

Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. 329, 365 (1973) 7

LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup.Ct. Rev. 127, 142 7

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BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Interest of Amicus Curiae and Consent

The State Public Defender of California is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants. The outcome of the instant case will have substantial impact upon the rights of many persons being represented by this office, as well as upon the public as a whole, to be free from unreasonable searches of their personal effects. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of the petitioner.

This brief is filed pursuant to Rule 36 of the Rules of the Supreme Court of the United States. Verbal consent to the filing of the brief has been given by Marshall W. Krause, Esq., and by the Office of the Attorney General of the State

of California, counsel for petitioner and respondent, respectively. Letters reflecting such consent will be filed with the Clerk of this Court shortly.

ARGUMENT

The Outward Appearance of a Container Can Provide No More Than Probable Cause; It Cannot Excuse the Failure to Obtain a Warrant.

The warrant requirement is the cornerstone of the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States.[1] *United States v. United States District Court*, 407 U.S. 297, 316 (1972). "[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, when an exception to the warrant requirement is alleged to apply, "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

Can that burden be discharged merely be showing that there was strong probable cause to believe that material subject to seizure was located in the place which was searched? Numerous decisions of this Court have held that it cannot. *See, e.g., Arkansas v. Sanders*, 442 U.S. 753, 758 (1979); *Katz v. United States, supra*, 389 U.S. at 357; *Johnson v. United States*, 333 U.S. 10, 14 (1948). "Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a

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[1] "The warrant clause includes three distinct protections: the requirement of probable cause ensures justification; the requirement of particular description guarantees limitation; and the requirement of prior determination compels neutral evaluation. Thus, compliance with the warrant requirement ensures the sanctioning of only justifiable limitations, reasonable in scope." Note, United States v. Chadwick *and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. Rev. 436, 459 (1978) [hereinafter cited as The Lesser Intrusion Concept] (footnotes omitted).

search." *Chambers v. Maroney*, 339 U.S. 42, 51 (1970). These cases established a simple, workable rule: In the absence of exigent circumstances, both probable cause *and* a warrant are required.

Unfortunately, this previously sharp distinction between facts showing probable cause and facts showing an exception to the warrant requirement was blurred by dicta in *Arkansas v. Sanders, supra*, 442 U.S. at 764 n. 13 [hereinafter referred to as footnote 13].[2] *Sanders* held that the "automobile exception" may not be used to justify the warrantless search of containers lawfully seized from a moving vehicle. 442 U.S. at 765. With that holding we heartily agree. It is the hypothetical suggestion in footnote 13 that warrantless searches are permitted of containers, the contents of which can be inferred from their exterior, which departs from prior law and engenders needless confusion for the police, the public, and the courts.

This Court has consistantly held that the inference-drawing process is the function of the magistrate, not of "the officer engaged in the often competitive process of ferreting out crime." *Johnson v. United States, supra*, 333

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[2]Footnote 13 provides as follows:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. See *Harris v. United States*, 390 U.S. 234, 236, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968) (per curiam). There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

U.S. at 14; *accord, Mincey v. Arizona*, 437 U.S. 385, 395 (1978). Thus, a warrant was required for the search of the footlocker in *United States v. Chadwick*, 433 U.S. 1 (1977) despite both the fact that abundant probable cause supported the search and the fact that a portion of the footlocker's contents (the talcum powder leaking from inside) was actually in plain view. 433 U.S. at 15-16. This holding is clearly inconsistent with the dicta in footnote 13.[3]

It would be unreasonable for this Court to overrule its prior decisions and elevate footnote 13 into a new rule of law. A rule equating a container's suggestive outward appearance with a plain view of the contents thereof[4] is a rule incapable of uniform application. Neither policemen nor judges can be expected to agree on the extent to which a container's contents are inferrable from its outward appearance.[5] What is obvious to one person will simply not

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[3]Footnote 13 is also in conflict with the views expressed by Justice Stephens in his plurality opinion in *Walter v. United States*, 447 U.S. .... , 65 L.Ed.2d 410 (1980), which involved the search of boxes, "on one side of which were suggestive drawings, and on the other were explicit descriptions of the contents." 65 L.Ed.2d at 414. In concluding that the boxes' outward appearance did not justify a warrantless inspection of the contents, he explained that "[t]he fact that the labels on the boxes established probable cause to believe the films were obscene clearly cannot excuse the failure to obtain a warrant; for if probable cause dispensed with the necessity of a warrant, one would never be needed." *Id.* at 418 n. 10.

[4]"It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents." *People v. Marshall*, 69 Cal.2d 51, 59, 442 P.2d 665, 669, 69 Cal.Rptr. 585, 589 (1968) (Traynor, C.J.), *overruled on other grounds in* footnote 18 of *Guidi v. Superior Court*, 10 Cal.3d 1, 17, 513 P.2d 908, 920, 109 Cal.Rptr. 684, 695 (1973).

[5]For an example of such disagreement, one need look no further than the California Court of Appeal opinion in the instant case. The majority and dissent expressed radically different views on the extent to which the contents of the green plastic-wrapped blocks were revealed by the method of packaging.

be obvious to another,[6] and the observer's prior training and experience may distort his judgment on that issue.[7] A literal application of footnote 13 would give the police virtually unlimited discretion to conduct warrantless searches while providing no guidance to the reviewing courts charged with the responsibility of evaluating the reasonableness of that activity.[8]

The resulting confusion is illustrated by *Scisney v. State*, 270 Ark. .... , 605 S.W.2d 451 (1980). That case involved the warrantless search of two very old suitcases secured by masking tape. The prosecution relied on footnote 13 to justify the search, citing the officer's testimony that, in the various drug schools he had attended, he had seen that type of suitcase and "normally [knew] what is used in them, although other things can be, too." 605 S.W.2d at 453. The Arkansas Supreme Court correctly declined to extend the dicta in footnote 13 to the facts of the case before it and held that the search of the suitcase was illegal. *Ibid.* However, what is disturbing about *Scisney* is not its result but the fact that the issue was litigated at all.

It should have been clear from the holding of *Arkansas v. Sanders, supra,* that suitcases at least were presumptively

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[6]The phenomenon of "reality" changing as it is filtered through the perceptions of different individuals is perhaps best illustrated by the classic Kurosawa film "Rashomon."

[7]Experiments suggest that policemen are especially prone to interpret ambiguous facts as being indicative of criminal activity. A.D. Yarmey, *The Psychology of Eyewitness Testimony* 159-160 (1979); *see also* S. Coren, C. Porac, & L.M. Ward, *Sensation and Perception* 418-19 (1979).

[8]In this respect, the policy which supports clarity in the substantive rules governing search and seizure is similar to the policy which requires certainty in criminal statutes. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

protected. *See, e.g., United States v. MacKay*, 606 F.2d 264, 265-66 (9th Cir. 1979). Yet the *Sanders* dicta gave the prosecution in *Scisney* a foot in the door, a basis for arguing that even luggage could be placed outside the warrant requirement if the facts relating to probable cause were sufficiently strong. Unless this "inferrability" concept is rejected by the Court, policemen and prosecutors will continue to use it to attack the warrant requirement that *Sanders* itself reaffirmed.[9]

By holding out the hope that no warrant will be found to have been necessary when a container's outward appearance provides a clue to what is contained therein, footnote 13 undermines the purpose of the exclusionary rule. That rule was designed to deter unlawful police activity, *United States v. Janis*, 428 U.S. 433, 446 (1976); and "[t]o effectively deter police misconduct, the Court must develop inflexible categories and clear rules," Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 365 (1973). As this Court recently stated in a related context: "A single, familiar standard is essential to guide police officers, who have only limited time to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979); *see also* LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup.Ct. Rev. 127, 142.

When this Court has concluded that the disadvantages of case-by-case adjudication outweigh the benefits, it has not

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[9]As Justice Jackson cautioned in his dissenting opinion in *Brinegar v. United States*, 338 U.S. 160, 182 (1949): "We must remember that the extent of every privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."

hesitated to adopt a per se rule. *Rakas v. Illinois*, 439 U.S. 128, 147 (1978), citing *United States v. Robinson*, 414 U.S. 218, 235 (1973). Adoption of a per se warrant requirement for container searches is needed to insure that police officers do not base their decisions as to the necessity of obtaining a warrant on unguided speculation as to the citizen's expectations of privacy and the extent to which those expectations should be respected. If the contents of a container are not in plain view and there has been no consent to search, a warrant should be obtained. *Cf. United States v. Rivera*, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980) (holding that a warrant was required to search sealed black polyethylene garbage bags containing bricks of marijuana); *see generally, The Lesser Intrusion Concept, supra* note 1, at 439, 458-61.[10]

A per se warrant requirement will give effect to the subjective expectation of privacy objectively manifested by the storage of property in an opaque container.[11] It will also promote the goals of the exclusionary rule by providing a clear standard to guide police conduct. Reasonable searches will not be prohibited; they will only be delayed until the probable cause determination can be validated by a mag-

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[10]Imposition of a per se warrant requirement would be especially appropriate in the area of container searches because one purpose of the warrant requirement "is to prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976). A determination of what is "inferrable" from a container's outward appearance will inevitably be influenced by what a search of that container has revealed.

[11]In determining the existence of a subjective expectation of privacy, "the type or form of container should be irrelevant, for it is the act of storing property which assumes importance and not the container in which it is stored." Comment, 11 Rut.-Cam. L.J. 169, 175 (1979).

istrate. Unreasonable searches, on the other hand, will be avoided, as the Fourth Amendment intends they should be.[12]

Any inferences as to the unseen contents of the sealed, opaque packages in the instant case should have been drawn by a magistrate, not by the police. This case illustrates the mischief which may come from following the opposite procedure. By placing opaque, sealed packages which resembled packages prepared for mailing into the trunk of his automobile, petitioner undoubtedly exhibited an expectation of privacy in his personal property. Even after these packages had been seized by the police, reasonable men could differ as to the possible nature of their contents. A clear and simple rule was needed so that the police, under these circumstances, would not have hesitated to obtain a warrant.

Conclusion

This Court should enunciate a simple and pragmatic rule to govern container searches: Whenever the police have seized a container and the contents are not in plain view, then absent exigent circumstances, they should obtain a warrant. This rule will both simplify the job of the police by specifying when they should seek a warrant and protect the Fourth Amendment rights of the people by insuring that their property will not be unnecessarily subjected to warrantless searches. Because the police in this case did not obtain a warrant when no exigency excused

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[12]The Fourth Amendment was "designed to prevent, not simply to redress, unlawful police action." *Chimel v. California*, 395 U.S. 752, 766 n. 12 (1969). Exclusion of illegally seized evidence is, therefore, only a partial remedy for the violation of the suspect's constitutional rights. *Ibid.* Furthermore, when the illegal search fails to uncover incriminating evidence, the exclusionary rule provides no remedy at all. That is one of the reasons why "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v. United States District Court, supra*, 407 U.S. at 318.

them from doing so, the judgment of the California Court of Appeal sustaining that search should be reversed.

DATED: March 4, 1981.

Respectfully submitted,

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No. 80-148

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JEFFREY RICHARD ROBBINS, PETITIONER

v.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of plastic-wrapped parcels found in petitioner's automobile during a lawful search of the automobile was reasonable under the circumstances presented and thus permissible under the Fourth Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents an important and frequently recurring question of Fourth Amendment law concerning the necessity of procuring a warrant in order to conduct a search upon probable cause of a parcel, bag, or other insubstantial or insecure container not commonly used as a place of safekeeping for personal effects. Although the court below held that the warrantless search of packages containing marijuana bricks was permissible because their outward appearance strongly suggested that they contained marijuana (Pet. App. A-6), the case presents the broader question whether a warrant must ordinarily be obtained in order to examine, with probable cause, the con-

tents of insubstantial packages and containers that are not the functional equivalent of luggage.

This Court's observation in *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979), that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment" has spawned a host of decisions in the lower courts classifying various containers, distinguishing between those in which an individual's privacy rights are sufficient to justify requiring that a warrant be obtained, where feasible, prior to any search, and those whose less private character permits a search on probable cause subject only to post-search judicial scrutiny. For the most part, these decisions hold warrants required to search containers that are, by their appearance or accepted use, comparable to personal luggage, but that society is not prepared to recognize a comparable privacy interest in other less substantial or private containers. See pages 9-10, and notes 3 & 5, *infra*. Whether the need to obtain a warrant before searching a container following its lawful seizure turns upon its status as a "common repository for one's personal effects," *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, or whether a different standard should govern, is a question of considerable importance for federal law enforcement activities.

STATEMENT

Following denial of his motion to suppress evidence and a jury trial, petitioner was convicted in the Superior Court for Solano County, California, upon charges of possession of marijuana, possession of marijuana for sale, and transportation of marijuana, in violation of Sections 11357, 11359 and 11360, re-

spectively, of the California Health and Safety Code (West 1975). The Court of Appeal affirmed the judgment. This Court granted petitioner's prior petition for certiorari, 443 U.S. 903 (1979), vacated the judgment of the Court of Appeal, and remanded the case for further consideration in light of *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). On remand the Court of Appeal adhered to its prior decision in relevant respects (Pet. App. A-1 to A-13). The California Supreme Court declined to review the decision of the Court of Appeal (Pet. App. A-14).

1. The evidence at the suppression hearing established that in the early morning hours of January 5, 1975, two California Highway Patrol officers stopped petitioner's station wagon after observing him driving erratically. After meeting the officers between the vehicles, petitioner began talking rapidly and exhibited difficulty in removing his license from his wallet. When petitioner returned to his vehicle to secure his vehicle registration and opened the door, one of the officers smelled marijuana smoke and observed on the front seat a pair of tweezers of the type used to hold marijuana roaches. He also found a pair of tweezers holding a burned, hand-rolled cigarette butt, an alligator clip, a hand-rolled cigarette, and a cookie tin containing marijuana seeds, two packs of cigarette papers, and a plastic baggie containing marijuana, all in the passenger compartment (Pet. App. A-2 to A-3).

While one officer was retrieving these objects, petitioner stated to the other officer: "What you are looking for is in the back." Petitioner was placed in the patrol car, and an officer opened the luggage compartment of his station wagon. In it he found a tote bag and two bulky packages wrapped in opaque,

green plastic and covered by an outer layer of transparent plastic. Each layer of plastic was sealed on the outside with a strip of tape. The officer opened all the packages. Each plastic-wrapped package contained a 15-pound block of marijuana; the tote bag contained approximately three pounds of marijuana (Pet. App. A-3, A-5, A-11 to A-12).

2. After this Court's remand, a divided Court of Appeal upheld the search of the plastic-wrapped packages,[1] distinguishing the luggage held to have been improperly searched in *Arkansas* v. *Sanders*, *supra*. Relying on the language in that decision that "some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance" (Pet. App. A-4, quoting 442 U.S. at 764-765 n.13), the Court of Appeal reasoned (Pet. App. A-6) that

> the very appearance of a bulky, fifteen pound, brick-shaped, plastic-wrapped package suggested that it contain[ed] a specific type of contraband (a brick of marijuana). * * * Any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana.[2] The parcels thus could not support a reasonable expectation of privacy and were not protected by the Fourth Amendment.

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[1] On remand, the State conceded that the warrantless searches of the cookie tin and tote bag were improper (Pet. App. A-6). The correctness of those concessions is not before this Court.

[2] During the suppression hearing, the officer who opened the packages testified that he had heard that blocks of marijuana were customarily wrapped and transported in this manner (A. 41).

SUMMARY OF ARGUMENT

The California Court of Appeal reached the correct result in this case by applying, in response to this Court's remand, the exception to the warrant requirement noted in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13, applicable to containers and packages whose very nature does not "deserve the full protection of the Fourth Amendment." In *Sanders*, this Court left to the lower courts the job of "determining which parcels taken from an automobile require a warrant for their search and which do not." *Ibid.* In response to this mandate, the state and federal courts have distinguished between containers akin to luggage, or that normally function as respositories for personal effects or papers, as to which a warrant is required, and insubstantial or insecure paper or plastic bags and packages, which ordinarily do not support expectations of security, integrity and privacy sufficient to require that the existence of probable cause be determined by a magistrate in advance of the search.

These decisions, including the decision of the Court of Appeal in this case, are sound and supported by the applicable decisions of this Court. Considering traditional indicia of Fourth Amendment protection, including the precautions taken by an individual claiming Fourth Amendment protection to preserve privacy, the conduct of the individual, and applicable property rights, see *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring), the lower courts have properly concluded that packages such as those at issue here do not fall within the protection of the Warrant Clause. The traditional uses of containers such as paper bags, and their inherent insecurity and impermanence, set them apart from containers

such as the luggage that was searched in *Arkansas* v. *Sanders*, *supra*, and *United States* v. *Chadwick*, 433 U.S. 1 (1977). The configuration and use of such casual containers militates against extending the warrant requirement, applied to luggage in *Chadwick* and *Sanders*, to the plastic wrapped parcels at issue here. Nothing in petitioner's conduct signaled that he viewed these parcels as matter deserving of protection on a par with luggage. Indeed, petitioner volunteered their location and clearly implied that they contained contraband, in a spontaneous declaration to the officers.

The conclusion that petitioner's packages were not invested with sufficient attributes of privacy to require a warrant prior to their search upon probable cause is considerably reinforced by the fact that their inspection was part of a search of petitioner's automobile that was lawful without a warrant under the Fourth Amendment. It is true, as the Court held in *Sanders*, that the mere fact that a container has been found in or seized from an automobile does not *ipso facto* remove the requirement—applicable if the container were found elsewhere—that a warrant be procured. But this was because the container in *Sanders*, personal luggage, is a common repository for personal effects, invested by society with markedly higher privacy value than the automobile itself. Insubstantial containers such as petitioner's plastic-wrapped brick of marijuana, on the other hand, are not accompanied by the same substantial societal privacy expectations and cannot meaningfully be differentiated, for purposes of determining whether a warrant should be required, from such areas as the locked trunk or glove compartment of the automobile. Accordingly, unlike the situation in *Sanders*, the same general

considerations that allow a warrantless probable cause search of an automobile justify treatment of containers such as petitioner's on the same basis.

ARGUMENT

THE FOURTH AMENDMENT PERMITS LAW ENFORCEMENT OFFICIALS TO CONDUCT WARRANTLESS SEARCHES, BASED ON PROBABLE CAUSE, OF INSUBSTANTIAL CONTAINERS NOT COMMONLY RECOGNIZED AS REPOSITORIES FOR PERSONAL EFFECTS

The decision of the California Court of Appeal turned on the court's conclusion, disputed by the dissenting judge, that the parcels searched here are the kind of containers as to which no warrant is necessary to support a probable cause search because their content is evident from the nature of the container. See *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13. But the facts of this case, and the questions presented by petitioner, raise the more general issue whether packages or containers lawfully seized can be opened on the basis of probable cause, but without a warrant, where the nature of the package, its location, the lack of precautions taken to assure privacy, or the behavior of the person claiming Fourth Amendment protection indicate the absence of that legitimate expectation of a high level of privacy which has traditionally been guarded by the warrant requirement. Accordingly, the focus of our argument is only incidentally upon those special characteristics of the parcels at issue here that indicated their contents, but more generally addressed to the limited privacy interest that attaches to packages and containers of their general character, which are not commonly considered to be repositories for personal effects.

1. The Fourth Amendment has been interpreted to require that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 758 (footnote omitted). Accordingly, on two recent occasions this Court has held that absent exigent circumstances, consent, or circumstances constituting a proper search incident to an arrest, a warrant is required before law enforcement officials may search luggage, even though they have probable cause to believe that it contains contraband or evidence of a crime, and even though the luggage is taken from a motor vehicle by police. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762-766 (suitcase); *United States* v. *Chadwick*, 433 U.S. 1 (1977) (double-locked footlocker). Noting that the established "automobile exception" to the warrant requirement rests in part on the "configuration, use, and regulation of automobiles [which] often may dilute the reasonable expectation of privacy that exists with respect to differently situated property," *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761, the Court declined to extend the automobile exception to luggage, observing that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. Because society recognizes luggage as a personal sanctuary, its placement in an automobile does not vitiate the reasonable and substantial expectation of privacy associated therewith. Accordingly, the fact that a suitcase is lawfully seized from an automobile based upon probable cause does not justify dispensing with the warrant requirement. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762.

On the other hand, the Court made it clear that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," offering by way of example

> containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. * * * There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched * * *.

Arkansas v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13. While this caveat left the status of containers other than personal luggage "hanging in limbo," *id.* at 768 (Blackmun, J., dissenting), the lower courts have shouldered the task of determining which kinds of containers and packages activate the warrant requirement of the Fourth Amendment. Invalidation of warrantless probable cause searches has generally been reserved for searches of containers that normally function as repositories for personal effects or papers, or that represent the functional equivalent of luggage, such as suitcases, briefcases, purses, duffle bags, knapsacks, and gym bags.[3] With the exception

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[3] See, *e.g.*, *United States* v. *Ross*, No. 79-1624 (D.C. Cir., Apr. 17, 1980), (leather pouch; collecting cases) (panel opinion), adhered to in relevant part on rehearing en banc (Mar. 31, 1981); *United States* v. *Presler*, 610 F.2d 1206 (4th Cir. 1979) (briefcases); *United States* v. *Miller*, 608 F.2d 1089

of the en banc decision by the District of Columbia Circuit in *United States* v. *Ross*, No. 79-1624 (Mar. 31, 1981),[4] the courts of appeals have uniformly declined to extend the warrant requirement to paper and plastic bags and packages.[5]

2. In drawing this line, the courts of appeals have been guided not only by the language of *Sanders* but by the factors that have traditionally been employed to determine the scope of Fourth Amendment protec-

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(5th Cir. 1979) (portfolio); *United States* v. *Montano*, 613 F.2d 147 (6th Cir. 1980) (suitcase); *United States* v. *Meier*, 602 F.2d 253 (10th Cir. 1979) (knapsack).

[4] The decision of the en banc court of appeals in *Ross*, overturning the panel decision and creating a conflict among the courts of appeals, was rendered just before this brief was completed. Accordingly, unless otherwise indicated, references in this brief to *Ross* refer to the panel opinion. We remain convinced that the panel opinion was sound in its conclusions regarding the status of paper bags under the Fourth Amendment.

[5] See *United States* v. *Ross*, *supra* (paper bag; collecting cases) (panel opinion), overturned in relevant part on rehearing en banc (Mar. 31, 1981); *United States* v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (paper bag); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (plastic and paper bags); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980) (beverage bag); *United States* v. *Bush*, Nos. 80-1116, etc. (3d Cir. Mar. 24, 1981) (cardboard box); *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) (pharmacy bag); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed paper bag); *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980) (paper bag); *United States* v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) (same); *United States* v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) (same); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979) (plastic bags of marijuana); but cf. *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), adhered to on rehearing, 615 F.2d 10 (1980).

tion: the precautions taken to preserve privacy, the manner in which the interested individual has employed the object or location to be searched, and applicable property rights insofar as they also reflect widely-shared privacy expectations. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring). Particularly significant has been the individual's demonstrated interest or lack of interest in assuring privacy, as evidenced by the nature of the container chosen. For instance, in distinguishing a paper bag from the luggage at issue in *Sanders*, the panel in *Ross* noted that

> paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break open very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

United States v. *Ross*, *supra*, slip op. 14 (citation omitted).[6] Accord: *United States* v. *Goshorn*, 628 F.2d 697, 700 (1st Cir. 1980); *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980).

In determining whether a warrant is required to conduct a probable cause search of an insubstantial or insecure container, the courts of appeals have also looked to the conduct of the individual claiming

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[6] See note 4, *supra*.

Fourth Amendment protection, insofar as it reflects his or her expectations of privacy. For instance, in *United States* v. *Jimenez*, 626 F.2d 39, 41 (7th Cir. 1980), the court of appeals' conclusion that the defendant lacked a high expectation of privacy regarding the contents of a paper bag she had been observed placing in her automobile trunk was supported in part by defendant's acknowledgement that the bag contained contraband. See also *United States* v. *Gaultney*, 581 F.2d 1137, 1143 (5th Cir. 1978). On the other hand, in *United States* v. *Dien*, 609 F.2d 1038, 1045 (2d Cir. 1979), the court held that the defendants had manifested a reasonable expectation of privacy by placing marijuana in sealed cardboard boxes secreted behind a plywood partition and painted-over windows in a truck.[7] See *United States* v. *Ross*, *supra*, slip op. 15 nn.5 & 6.

3. Contrary to petitioner's contention (Br. 24-40), the decisions of the lower courts applying these criteria do not depart from the teachings of this Court. First, petitioner errs in assuming (Br. 48) that the examples given in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13, of containers that do not command "the full protection of the Fourth Amendment" are exhaustive. This Court clearly signaled that it did not mean to decide all future cases, offering only examples of instances where diminished privacy expectations justify dispensing with a warrant and deliberately leaving the application of the general principle announced to development in the lower courts.

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[7] Without acknowledging that *Dien* was correctly decided, we cite it simply to illustrate the kind of inquiry employed by the courts of appeals to determine whether an expectation of privacy protected by the Warrant Clause was attached to a container that has been searched.

Ibid. In response to that mandate, the lower courts have, with substantial uniformity, distinguished between substantial sealed containers vested with the full privacy attributes of luggage on the one hand, and such containers as paper bags and casually wrapped packages on the other. See notes 3 and 5, *supra.* The resulting body of law provides a serviceable and fair means of distinguishing between those instances in which a warrant is required and those where none is required.

Petitioner errs as well in suggesting (Br. 36-40) that the basic criterion applied—whether the individual claiming Fourth Amendment protection had a reasonable expectation of privacy—is applicable only to the threshold question whether or not a search has occurred, and not to the question whether a warrant is required for a probable cause search. Indeed, in both *Arkansas* v. *Sanders, supra,* 442 U.S. at 764-765 n.13, and *United States* v. *Chadwick, supra,* 433 U.S. at 13, this Court applied the reasonable expectation of privacy test to determine whether or not an examination acknowledged to be a search subject to the Fourth Amendment was permissible absent a warrant. See also *Rakas* v. *Illinois, supra,* 439 U.S. at 152. (Powell, J., concurring). Similarly, the automobile exception to the warrant requirement has been expressly attributed to the lessened expectation of privacy inhering in automobiles, and plainly does not turn on any conclusion that no search is involved. *Cardwell* v. *Lewis,* 417 U.S. 583, 590 (1974) (opinion of Blackmun, J.); *Cady* v. *Dombrowski,* 413 U.S. 433, 442 (1973); cf. *South Dakota* v. *Opperman,* 428 U.S. 364, 367 (1976). Reduced expectations of privacy also justify warrantless administrative searches of pervasively regulated businesses. *United States* v. *Biswell,* 406 U.S. 311, 316 (1972); *Colonnade Cater-*

ing Corp. v. *United States*, 397 U.S. 72, 74, 77 (1970).

The decision of the California Court of Appeal, like the numerous decisions of the United States Courts of Appeals holding no warrant required for searches of various kinds of bags and insecure parcels, rests fundamentally upon the "configuration * * * [and] use" of the containers involved, a fundamental basis for the automobile search exception. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761. Just as an automobile operated on public roads must, as a practical matter, be deemed subject to a degree of official and unofficial scrutiny quite different from that affecting a home or office, *Carroll* v. *United States*, 267 U.S. 132, 153 (1925); *Chambers* v. *Maroney*, 399 U.S. 42, 48 (1970), a plastic bag or parcel lacks the integrity, privacy and security attributes of luggage that explain the results in *Chadwick* and *Sanders*. See 442 U.S. at 764.

To be sure, various types of containers besides suitcases and footlockers—such as briefcases, knapsacks, and duffle bags—may be "inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, quoting *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. In general, such items are repositories for clothing, toiletries, personal or business records, and the most intimate of items associated with daily living. The same, however, cannot be said of paper grocery sacks, plastic bags, or packages of a similar nature. The intended and typical function of these containers is to facilitate the movement of merchandise, or to contain bulk items.[8]

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[8] The dissenting judge in the Court of Appeal likened the photograph of the package in this case to a package of highway flares he had recently purchased (Pet. App. A-11). Whatever force this observation may have to rebut the majority's conclusion that the package manifestly contained a brick of

We recognize, of course, that a common grocery bag or a similar container may at times be pressed into service as a repository for personal effects. But such atypical use, without more, does not invest such containers with the protection of the Warrant Clause, for unrepresentative use is not part of the conventional "understandings that are recognized and permitted by society," which are the touchstone for assessing the scope of Fourth Amendment protection. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12.[9]

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marijuana (and the dissenter overlooked the fact that the officer could feel as well as see the package), it simply highlights the fact that parcels of this sort are generally unlikely to have very private contents.

[9] For instance, we doubt that one who chooses to live in his automobile would thereby render the automobile search exception inapplicable to the contents of his automobile. This case does not present the question whether, by reason of particular features, the appearance of a parcel, its surroundings, the conduct of the person claiming Fourth Amendment protection or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for non-private use as to compel law enforcement officers to procure a warrant prior to initiating a search. See *United States* v. *Markland*, *supra*, 635 F.2d at 177; *United States* v. *Ross*, *supra*, slip op. 15-16 & n.6. It may be, for instance, that the markings or appearance of a parcel may make it apparent that it is destined for dispatch by mail—a status that accords it full protection under the Warrant Clause. See, *e.g.*, *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Or the construction of the container, the precautions taken to seal and secrete it, or its markings may demonstrate that the owner desires to retain a high degree of privacy with regard to its contents. See *United States* v. *Dien*, *supra*, 609 F.2d at 1044-1045 (defendant manifested an expectation of privacy by securely taping cardboard boxes and secreting them behind a plywood barrier in a vehicle whose windows had been blacked out; but see note 7, *supra*). Finally, in some cases, the owner's circumstances or his surroundings might make it apparent that a paper bag or similar con-

The very nature of such containers is at odds with a reasonable expectation that their contents will be protected from public exposure. Unlike a suitcase, footlocker or other types of luggage, paper bags and similar packages offer at best only minimal protection against accidental or deliberate intrusion. Such items cannot be latched or secured. They are easily torn, resulting in spillage of their contents or their disclosure to public view. Indeed, their contents frequently can be discerned merely by observing, holding, or feeling them.[10] In short, "it is doubtful that one realistically can expect a paper bag [or a container of a similar character] to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands." *United States* v. *Ross*, *supra*, slip op. 14; see *United States* v. *Mannino*, *supra*, 635 F.2d at 114; *United States* v. *Honigman*, *supra*, 633 F.2d at 1338; *United States* v. *Mackey*, *supra*, 626 F.2d at 687; see also, 2 W. LaFave, *Search and Seizure*, § 5.5, at 365 (1978).

The principal function served by the warrant in the case of a search of a seized container is as prophylaxis against misjudgment by overzealous officers regarding the existence of a reasonable basis in

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tainer is a repository for his personal effects. Where these or similar objective factors indicating the special status of a paper bag or similar package are present, procurement of a warrant may be necessary before proceeding with a search. In the absence of such circumstances, the owner's subjective expectation of privacy in such a parcel is insufficient to trigger the warrant requirement.

[10] Thus once it is granted, as in the case here, that such a parcel has been lawfully seized, the contents are likely, given the nature of the container, to be largely disclosed to an officer's sense of touch. Such vulnerability to at least partial disclosure of a container's contents without even opening it suggests a considerably reduced privacy value when compared with luggage.

known facts to justify the search. In some proportion of cases, the interposition of a neutral and detached magistrate will serve to prevent an unreasonable invasion of privacy. A warrant is required in cases involving luggage because of the judgment that the costs of an unjustified search of such a high privacy area are unacceptable, and the prophylaxis of the warrant requirement has great value when it prevents such unjustified intrusions. But the costs associated with a mistaken invasion of relatively low privacy areas are substantially less, and the benefits to be gained by requiring a warrant are therefore greatly diminished.

Accordingly, in contrast with luggage, when a paper bag or container of similar material or construction comes legitimately into the hands of the police, the owner's residual expectation of privacy is justifiably overcome where, as here, the search is based upon probable cause. Compare *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764. Such a privacy interest, absent unusual circumstances, is simply insufficient to merit the protection of the Warrant Clause of the Fourth Amendment. See *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 590-592 (opinion of Blackmun, J.) (diminished expectation of privacy in exterior of motor vehicle permits warrantless examination of paint and tire treads where probable cause exists); *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978) (expectation of privacy in motor vehicle insufficient to require warrant for attachment of beeper where probable cause exists).[11]

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[11] We stress that such privacy interests are not unprotected by the Fourth Amendment. Even absent a reasonable expectation of a high degree of privacy, an intrusion into such a package must still satisfy the general reasonableness requirement of the Fourth Amendment. See *United*

4. Application of these principles to this case suggests the correctness of the result reached below. The containers at issue were plastic wrapped parcels. Nothing about their appearance suggested that they served as the functional equivalent of luggage or as repositories of personal effects. The plastic material involved did not constitute a secure permanent barrier against breakage or entry.[12] Neither the physical appearance of the package nor the surrounding circumstances suggest that petitioner regarded these packages as equivalent to luggage in function or invested with a comparable degree of privacy. The outward appearance of petitioner's parcels indicated that their contents were likely a single, bulky, brick-shaped object, rather than personal effects. Indeed, petitioner's spontaneous statement (Pet. App. A-3) to an officer of the California Highway Patrol that "[w]hat you are looking for is in the back" precludes any claim that petitioner held such an expectation of privacy. *United States* v. *Jimenez, supra*, 626 F.2d at 41; *United States* v. *Gaultney, supra*, 581 F.2d at 1141.[13] Nor is the fact that tape was affixed to the

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States v. *Mannino, supra*, 635 F.2d at 113; *United States* v. *Markland, supra*, 635 F.2d at 176 (search in fulfillment of police duty to protect the property of citizens). See *Cardwell* v. *Lewis, supra*, 417 U.S. at 592 (opinion of Blackmun, J.). Here, of course, it is undisputed that the search was supported by probable cause. Where reasonable justification is lacking, the fruits of a search are subject to suppression and a civil damage remedy may be available.

[12] There is in any event no record support for petitioner's claim (Br. 26 n.2) that the packages at issue were wrapped "in heavy duty plastic similar to a type used in commercial packaging."

[13] The State of California did not urge below that the search was consented to. Accordingly, the question whether

plastic wrapping of the petitioner's package controlling here. While, under some circumstances, sealing a package with tape might manifest the owner's special expectation of privacy respecting the contents of the package, see *United States* v. *Ross*, *supra*, slip op. 15-16 n.6, it appears that tape was used here simply to form a container and prevent spillage. Unlike a latch or lock on a piece of luggage, which permits security while making it possible for authorized persons to open and close the container, and reuse it, a taped parcel simply maintains the contents intact. Under these circumstances, taping itself is insufficient to establish the expectation of privacy necessary to bring the Warrant Clause into play.[14]

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petitioner's spontaneous statement provides an independent basis for dispensing with a warrant is not presented here. Compare *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-490 (1971).

[14] The respondent did not urge in the Court of Appeal that *Chadwick* and *Sanders* are inapplicable to the search at issue, notwithstanding the fact that the search was conducted and the motion to suppress denied well before either of those cases was decided. This contention was raised in the State's opposition to petitioner's earlier petition for certiorari, No. 78-567, but was not pressed upon remand, apparently because of the intervening decision of the California Supreme Court in *People* v. *Minjares*, 24 Cal. 3d 410, 421 n.6, 591 P.2d 514, 519 n.6, 153 Cal. Rptr. 224, 229 n.6, cert. denied, 444 U.S. 887 (1979), holding, incorrectly in our view, that *Chadwick* is to be applied retroactively.

Assuming that the issue may be reached in this Court, as we think it may, see *Bowen* v. *United States*, 422 U.S. 916, 920-921 (1975); *Bondholders Committee* v. *Commissioner*, 315 U.S. 189, 192 n.2 (1942), the judgment could properly be affirmed on the ground that *Chadwick* and *Sanders* should not be given retroactive effect. As evidenced by the original decision of the Court of Appeal in this case (78-567 Pet. App. iv), the

5. Our argument thus far has addressed the question whether warrantless searches of containers such

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warrantless search of the package at issue here was deemed to fall within the automobile search exception of *Carroll, supra,* and *Chambers* v. *Maroney, supra,* prior to this Court's decision in *Sanders.* (Indeed, prior to *Sanders* the United States Court of Appeals for the Ninth Circuit interpreted *Chadwick* as inapplicable to a search even of luggage found during an automobile search. *United States* v. *Finnegan,* 568 F.2d 637 (9th Cir. 1977); but see *People* v. *Minjares, supra.* This uncertainty as to the scope of *Chadwick* occasioned the grant of certiorari in *Sanders, supra,* 442 U.S. at 754 n.1.) Prior to *Chadwick* the courts of appeals generally construed the automobile search exception to encompass searches of briefcases and luggage found within automobiles. *United States* v. *Chadwick, supra,* 433 U.S. at 23 n.4 (Blackmun, J., dissenting; collecting cases); *United States* v. *Evans,* 481 F.2d 990, 993-994 (9th Cir. 1973). Accordingly, *Chadwick* and *Sanders* established new law for California. See *United States* v. *Stewart,* 595 F.2d 500, 503-504 (9th Cir. 1979) (*"Stewart I"*); *United States* v. *Stewart,* No. 79-2710 (9th Cir. Mar. 2, 1981) (*"Stewart II"*); but see *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6; cf. *United States* v. *Medina-Verdugo,* Nos. 79-1042, 79-1309 & 79-1314 (9th Cir. Oct. 23, 1980). In this case, retroactive application of *Chadwick* and *Sanders,* if extended to cover insubstantial containers, would result in suppression of relevant evidence without providing any deterrent against unlawful searches or protecting the integrity of the courts. It would retard, rather than advance the truth-finding function of the criminal trial. Moreover, there is no suggestion that the police officers who searched petitioner's parcel acted in less than good faith. Accordingly, there is no occasion to apply *Chadwick* or *Sanders* to probable cause searches undertaken prior to the decision in *Chadwick.* See *United States* v. *Peltier,* 422 U.S. 531, 535-539 (1975); *Stewart I, supra,* 595 F.2d at 503-504; *Stewart II, supra,* slip op. 593-596; *United States* v. *Calandrella,* 605 F.2d 236, 250-253 (6th Cir.), cert. denied, 444 U.S. 991 (1979) (collecting cases); *United States* v. *Berry,* 571 F.2d 2 (7th Cir.), cert. denied, 439 U.S. 840 (1978); but see *United States* v. *Schleis,* 582 F.2d

as petitioner's parcel of marijuana are unreasonable per se under the Fourth Amendment in the absence of

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1166, 1173-1174 (8th Cir. 1978); *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6.

As the Sixth Circuit and the Ninth Circuit have noted, *Calandrella, supra,* 605 F.2d at 252; *Stewart II, supra,* slip op. 594, the retroactivity issue was not presented by the State's petition in *Sanders* or adverted to in the Court's opinion, even though the search there at issue antedated *Chadwick.* The decision in *Sanders* accordingly does not bespeak any view on the retroactivity question. Nor, plainly, does this Court's remand (433 U.S. 905 (1977)) of an earlier decision by the Eighth Circuit in *Schleis, supra,* for reconsideration in light of *Chadwick,* or the remand in this case for reconsideration in light of *Sanders,* indicate any view on the retroactivity question. *United States* v. *Calandrella, supra,* 605 F.2d at 252; but see *People* v. *Minjares, supra,* 24 Cal. 3d at 421 n.6, 591 P.2d at 519 n.6, 153 Cal. Rptr. at 229 n.6. In *Bowen* v. *United States, supra,* this Court originally remanded (413 U.S. 915 (1973)) the case to the Ninth Circuit for reconsideration in light of *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973). It subsequently held *Almeida-Sanchez* non-retroactive (*United States* v. *Peltier, supra*) and, indeed, criticized the court of appeals for reaching the merits of Bowen's Fourth Amendment claims on the remand. See 422 U.S. at 920-921.

We note as well that petitioner's contention (Br. 60-68) that the California Court of Appeal impermissibly strayed from the mandate of this Court, when it reinstated its judgment relying upon language in *Sanders,* is frivolous. Plainly, this Court's action in vacating the Court of Appeal's prior judgment and remanding for reconsideration in light of *Sanders* required the court of appeal to consider all aspects of *Sanders.* If this Court had meant to direct reversal of the original appellate judgment in this case, as petitioner effectively suggests, ample means for expressing that intention were available. Petitioner's reliance on *NAACP* v. *Alabama ex rel. Patterson,* 360 U.S. 240, 244 (1959), is misplaced.

consent or exigent circumstances. If our arguments are sound, warrantless probable cause searches of such containers comport with the Fourth Amendment regardless of the location in which the container is found or from which it is seized. But the argument has special force in the context of the present case, where the officers had probable cause to search an automobile, and the container within was one of the places where they could reasonably expect to find the contraband for which they were searching. See *Arkansas* v. *Sanders, supra,* 442 U.S. at 767-768 (Burger, C.J., concurring in the judgment). If, as is well settled, the privacy interest in an automobile is sufficiently limited that probable cause suffices to justify a warrantless search of its interior, including a locked trunk or glove compartment (*e.g., Chambers* v. *Maroney, supra,* 399 U.S. at 48-51; *Cooper* v. *California,* 386 U.S. 58 (1967); *Carroll* v. *United States, supra,* the imposition of a warrant requirement respecting containers located in the automobile is logical only upon a conclusion that those containers have substantial independent privacy attributes that require that they receive additional Fourth Amendment protection.

The structural integrity and privacy expectations invested in a suitcase or footlocker make it reasonable to discount their location in an automobile by requiring that a warrant be obtained to complete their search, absent exigent circumstances. *Arkansas* v. *Sanders, supra,* 442 U.S. at 765. But the insub-

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There this Court held that the Supreme Court of Alabama was barred by this Court's earlier reversal, 357 U.S. 449 (1958), of the state court's decision from "re-examining the grounds" of this Court's earlier decision. No such re-examination of settled questions has occurred here.

stantial plastic wrappings in which petitioner had bundled his marijuana brick did not meaningfully differentiate their contents from the other contents of petitioner's automobile. The nature of petitioner's parcel accordingly would not support a confident expectation that its contents would remain separate from the contents of the car in which it had been placed. See *United States* v. *Mackey, supra,* 626 F.2d at 687; cf. *Arkansas* v. *Sanders, supra,* 442 U.S. at 766-768 (Burger, C.J., concurring).

While the placement of a container within an automobile does not automatically deprive its contents of the level of protection afforded to such a container in another setting, the decision to carry a parcel such as petitioner's in an automobile, which by reason its "configuration, use, and regulation" dilutes any expectation of privacy in its contents, *Arkansas* v. *Sanders, supra,* 442 U.S. at 761, nonetheless reflects petitioner's failure to take such precautions to maintain his privacy as would manifest that expectation of a high degree of privacy protected by the Warrant Clause of the Fourth Amendment. See *Rakas* v. *Illinois, supra,* 439 U.S. at 152-153 (Powell, J., concurring). Accordingly, the setting in which petitioner's parcel was discovered provides an additional indication that a warrantless search was reasonable in the circumstances of this case.[16]

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[16] Yet another circumstance which indicates that petitioner could have little legitimate expectation of privacy in the contents of his parcels is the fact that they contained only contraband. Contraband is material whose very possession law proscribes and to whose possession " 'the government is entitled.' " *Carroll* v. *United States, supra,* 267 U.S. at 149, quoting *Boyd* v. *United States,* 116 U.S. 616, 623 (1886). California has provided by statute that controlled substances

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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and their containers are subject to forfeiture; warrantless seizures are authorized in some instances. Cal. Health & Safety Code § 11470 (West Cum. Supp. 1981). Although marijuana is not technically classified as a controlled substance, provision is made for disposition of marijuana that comes into the hands of police. Cal. Health & Safety Code § 11478 (West Cum. Supp. 1981). In *Cooper* v. *California*, 386 U.S. 58, 60-61 (1967), a warrantless search of an automobile was upheld based on other provisions of California law which authorize seizure and forfeiture of any vehicle used for transportation of narcotic substances. Each of these statutory provisions reflects the diminished property rights society recognizes in contraband materials, and they indicate that such materials cannot support a substantial expectation of privacy. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153 (Powell, J., concurring). Where, as here, the wrappings in which contraband is placed do not themselves reflect an expectation of substantial privacy respecting their contents, and in fact permit an observer to discern the contraband contents without opening the parcel, the ensuing warrantless search was reasonable and thus permissible under the Fourth Amendment.

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